83 - 1533

Docket No. _____

IN THE

Supreme Court of the United States

October Term 1983

PHILLIP WAYNE TOMLIN,
Petitioner,

vs.

STATE OF ALABAMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Petitioner, Phillip Wayne Tomlin, was prejudiced by the operation of the preclusion clause in Alabama's 1975 death penalty act, his conviction for capital murder thus being an unconstitutional denial of his right to due process, and entitling the said Petitioner to a new trial.

A. Whether the Petitioner, Phillip Wayne Tomlin, was prejudiced by the operation of the preclusion clause in Alabama's 1975 death penalty act, and denied due process of law, by the ex post facto determination of the Alabama Supreme Court that an alibi defense would conclusively preclude the Defendant from invoking or proffering evidence of, and obtaining jury instructions, on a lesser included offense in a new trial.

B. Whether the Petitioner, Phillip Wayne Tomlin, was prejudiced by the operation of the preclusion clause in Alabama's 1975 death penalty act, and denied due process of law, insofar as the State of Alabama failed to prove beyond a reasonable doubt the requisite aggravating elements of capital murder, the jury was precluded from finding the Petitioner guilty of a lesser included offense, and the jury was also precluded from considering aggravating and mitigating circumstances in a bifurcated hearing.

II. Whether the Petitioner, Phillip Wayne Tomlin, was prejudiced by the operation of the preclusion clause in Alabama's 1975 death penalty act, and his conviction for capital murder was an unconstitutional denial of equal protection under the law.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

The Petitioner, Phillip Wayne Tomlin, by and through his attorneys of record, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Alabama, which judgment was entered on rehearing on or about December 9, 1983.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Alabama, on rehearing, is attached hereto in the appendix as Exhibit A. The opinion of the Alabama Court of Criminal Appeals can be found at 443 So. 2d 47 (Ala. Crim. App. 1979)

JURISDICTION

Jurisdiction of the United States Supreme Court is invoked pursuant to 28 USC §1257(3),

Petitioner having asserted below and asserting herein the deprivation of rights secured by the Constitution of the United States. The judgment sought to be reviewed was rendered by the Alabama Supreme Court, on rehearing, on December 9, 1983, and is attached hereto in the appendix as Exhibit A.

The Petitioner timely filed this petition for Writ of Certiorari on or about the 7th day of February, 1984; however, due to technical deficiencies in format and type-size of the appendix, the said petition was returned to counsel for the Petitioner, with leave to amend the same and refile for docketing.

The amended version of this petition for Writ of Certiorari has been timely refiled in compliance with the directions of the Clerk of the United States Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of Alabama law: Code of Alabama, 1975, §13-11-2(a)(7) and (10).

> "If the jury finds the Defendant guilty, it shall fix the punishment at death when the Defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include lesser offenses...
>
> (7) Murder in the first degree when the killing was done for a pecuniary or other valuable consideration or pursuant to a contract or for hire;...
>
> (10) Murder in the first degree wherein two or more human beings are intentionally killed by the Defendant by one or a series of acts;..."

STATEMENT OF THE CASE

The Petitioner, Phillip Wayne Tomlin, was indicted by the Grand Jury of Mobile County, Alabama on September 22, 1977 for capital murder as defined in Code of Alabama (1975), 13-11-2(a)(7) and (10). On October, 13, 1977 the Petitioner was arraigned, and pleaded not guilty to the charges in the indictment. (R. pp. 1,2)

On March 20, 1978, a jury was struck by the parties, and empaneled, whereupon a trial began and continued. The State of Alabama produced no eyewitnesses nor any witnesses who could otherwise place the Petitioner at the actual scene of the crime. Instead, the prosecution relied solely on the basis of circumstantial evidence to get a jury to convict the Petitioner, and mandatorily sentence him to death without benefit of a bifurcated

hearing before the said jury on the issue of aggravating and mitigating circumstances. At the close of the State's evidence, the Petitioner filed a written Motion to Exclude and a Judgment of Acquittal and the said motions were denied. (R. pp. 26-31, 161-165)

The Petitioner, Phillip Wayne Tomlin, acting by and through his attorneys, and believing that under the preclusion clause in the statute it would be both a dangerous risk and fruitless in any event to produce evidence of lesser included offenses such as first degree murder and/or second degree murder, then presented an alibi defense in rebuttal to the State's circumstantial case against him.

After the giving of plainly inadequate, if not erroneous instructions and reinstructions to the jury, which were excepted to by defense counsel, on

Saturday, March 25, 1978, the jury returned a verdict of guilty. (R. p. 33) (R. 973, 974, 979, 982-987)

On the 21st day of April, 1978, the Petitioner filed a motion for a new trial and on May 26, 1978 the said motion was denied. (R. pp. 39-174)

Thereafter, on December 8, 1978, the court held a hearing ostensibly to consider aggravating and mitigating circumstances, sustained the verdict of the jury, and sentenced the Petitioner, Phillip Wayne Tomlin, to death. (R. pp. 175-179) Appeal was taken to the Court of Criminal Appeals of Alabama which affirmed the conviction, but remanded the case to the trial court for a new sentencing hearing to reevaluate aggravating and mitigating circumstances, and redetermine the Petitioner's sentence.

After Petitioner's application for rehearing and Rule 39(k) Motion were

denied by the Alabama Court of Criminal Appeals, a petition for writ of certiorari was then timely filed before the Supreme Court of Alabama, and granted.

On July 31, 1980 the Petitioner filed a motion in the Supreme Court of Alabama to reverse his conviction, in part on the basis of the United States Supreme Court's decision in Beck v. Alabama, 447 US 625, 100 S. Ct. 2382, 65 L. Ed. 392 (1980).

On August 28, 1981, the Supreme Court of Alabama reversed the conviction and ordered a new trial for the Petitioner, Phillip Wayne Tomlin. Thereafter, the State of Alabama filed an application for rehearing before the Alabama Supreme Court, contending that the decision of the United States Supreme Court in Hopper v. Evans, 456 US 605, 102 S. Ct. 2049, 72 L. Ed. 2d 367 (1982) precluded the Petitioner's right to a new trial.

On December 9, 1983, the Alabama Supreme Court granted the application for rehearing, withdrew its opinion of August 28, 1981 ordering a new trial, and affirmed the conviction of the Petitioner for capital murder, and remanded the case back to the trial court for resentencing. This case is now pending before the United States Supreme Court on petition for certiorari.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In his Petition for Writ of Certiorari, before the Supreme Court of Alabama, and motions and briefs filed in support of the said Petition for Certiorari and also filed in opposition to the State of Alabama's application for rehearing, the Petitioner contended that he was prejudiced by the operation of the preclusion clause in Alabama's 1975 death penalty act, and his conviction for capital murder was an unconstitutional denial of his right to due process of law under the United States Constitution.

The Petitioner, Phillip Wayne Tomlin, also necessarily raised the issue in his briefs in opposition to the State of Alabama's application for rehearing, that for the Alabama Supreme Court to impose, ex post facto, a new unforeseeable rule of law, to-wit,

that defendants who had raised an alibi defense under Alabama's 1975 death penalty statute could not under any circumstances claim prejudice, deprived the Petitioner, and a class of unwary capital murder defendants and their respective attorneys, of their constitutional right to due process, effective assistance of counsel, and equal protection under the law.

The Supreme Court of Alabama, on rehearing, issued an opinion rejecting all of the contentions raised by the Petitioner. The Alabama Supreme Court both failed to directly address and summarily disposed of these constitutional infirmities by misguided reliance upon a precedent and new, unforeseeable rule of law it had established in the aftermath of Hopper v. Evans, 456 US 605, 102 S. Ct. 2049, 72 L. Ed. 2d 367 (1982); to-wit, in the case of Cook v. State, 431 So. 2d 1322 (Ala. 1983).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THE DECISION OF THE ALABAMA SUPREME COURT ON REHEARING IN THE CASE AT BAR, AND THIS PETITION FOR WRIT OF CERTIORARI, RAISES SIGNIFICANT CONSTITUTIONAL ISSUES OF FIRST IMPRESSION, AND COMPELLING PUBLIC POLICY CONSIDERATIONS, BEFORE THE UNITED STATES SUPREME COURT.

A. Petitioner, Phillip Wayne Tomlin, has been deprived of due process of law, effective assistance of counsel, and equal protection under the law by the ex post facto determination of the Alabama Supreme Court that an alibi defense raised under Alabama's 1975 death penalty statute, which statute was declared by the United States Supreme Court to be unconstitutional in Beck v. State of Alabama, 447 US 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), would conclusively preclude any claim by

the Petitioner that different trial tactics and strategy could and would have been employed, evidence was and could have been invoked and/or introduced, and jury instructions obtained, that establish that Petitioner was guilty of no more than a lesser included offense. The question of whether a defendant, charged with capital murder under Alabama's 1975 death penalty statute, to-wit, Alabama Code (1975), §13-11-2, et seq., and unwary of a new and unforeseeable rule of law which would evolve from appellate decisions handed down long after the trial of the Petitioner for capital murder, is prejudiced thereby, is a significant constitutional issue compelling consideration by the United States Supreme Court.

In order to fully understand the constitutional violations suffered by the Petitioner, Phillip Wayne Tomlin, it is

imperative to understand the perspective of counsel for the Petitioner at the time of trial in 1978. The Alabama Supreme Court, in epitomizing the constitutional defects in Alabama's 1975 death penalty statute, clearly identified how limited the options were for a Defendant charged with capital murder under the then existing law of Alabama, when it held:

> "A majority of this court, however, also recognized that the death penalty statute applicable to Beck, because of its preclusion clause, did not allow jury instructions on lesser included offenses. Hence, any offer of evidence thereof, or any plea based thereon would have been irrelevant and impermissible at trial under that statute. Accordingly, the cases of persons tried and convicted under Code of 1975, §13-11-1 to 9, as construed in Beck v. State, supra, have been remanded for new trials on the merits in order to afford them the opportunity to proffer evidence of lesser included offenses. Beck v. Alabama, supra, Beck v. State, supra.

> That result, of course, represents adherence to, not departure from, the rule requiring the jury instruction on lesser included offenses when such a charge is warranted by evidence." (Emphasis added) Ex Parte Reed, 407 So. 2d 152, 163 (Ala. 1981)

The Petitioner herein, Phillip Wayne Tomlin would respectfully submit that the operation of the preclusion clause in the death penalty statute under which he was convicted inherently dictated the trial tactics and strategy adopted and pursued by the Petitioner and his attorneys. As the Alabama Supreme Court expressly recognized in the Reed case, supra, and the United States Supreme Court held in the case of Beck v. State of Alabama, supra, not only would 'the offer of evidence and jury instructions on a lesser-included offense have been irrelevant and impermissible at trial under that statute'; but a defendant charged with capital

murder, who actively sought to introduce evidence of guilt of a lesser-included offense, faced the risk, indeed the realization, that if a capital jury found the defendant guilty of any killing, that jury would then be required by law to choose between acquitting the defendant of everything, or else convicting the defendant of capital murder, and ipso facto sentencing that defendant to die by electrocution.

Certainly, had counsel for the Petitioner been able to see into the future, and read into the minds of the Justices who now sit on the United States Supreme Court and Alabama Supreme Court respectively, trial tactics and strategies regarding whether or not to put Petitioner on the stand to testify to an alibi, and/or decisions regarding the scope and emphasis on the cross-examination of key witnesses for the prosecution would have

been significantly affected. The crux of the problem is essentially that the Petitioner, by being bound by a new and unforeseeable rule of law regarding the impact of his taking the stand and raising the defense of alibi, has been deprived of due process of law, and effective assistance of counsel. The plain and unassailable fact of the matter is that neither the Petitioner nor his attorney purports to be a fortune teller with the ability to predict what standards and rules of law may or may not evolve in the future. Rather, Petitioner and his counsel undertook to try the capital murder case under the then existing applicable rules of law, and really had no choice but to do so. Clearly to now impose upon the Petitioner, who was charged with capital murder under Alabama's 1975 death penalty statute, a new and unforeseeable rule of law, to-wit,

the ex post facto determination by the Alabama Supreme Court that an alibi defense would conclusively preclude any claim of prejudice the Petitioner suffered vis-a-via the preclusion clause in the statute, deprives the said Petitioner of due process of law, effective assistance of counsel and equal protection under the law.

It has been held that in measuring whether a defendant has been afforded effective assistance of counsel, "the test in the criminal case is one of fundamental due process, and the remedy for the failure to provide that is to afford the defendant a new trial.2" Mylar v. Wilkinson, 435 So. 2d 1237, 1239 (Ala. 1983); see also Washington v. Strickland, 693 F. 2d 1243, (11th Cir. 1982). While the case at bar does not fit within

the usual context of previous court opinions regarding failure to receive effective assistance of counsel, the issue is nevertheless clearly raised herein and impacts upon the Petitioner's fundamental right to due process and equal protection under the law. It is a significant constitutional issue of first impression, and involves compelling public policy considerations sure to arise in other cases to be decided by the court regarding the unfairness of imposing, ex post facto, a new and unforeseeable rule of law upon a defendant and his counsel in a capital murder case.

II. THE DECISION OF THE ALABAMA SUPREME COURT ON REHEARING IN THE CASE AT BAR IS MISGUIDED AND CONTRARY TO THE DECISION OF THE UNITED STATES SUPREME COURT IN BECK V. STATE OF ALABAMA AND HOPPER V. EVANS.

A. The United States Supreme Court in the landmark decision of Beck v. State

of Alabama, 447 US 625, 100 S. Ct. 3382, 65 L. Ed. 2d 392 (1980) held:

> "Alabama failure to afford capital defendants the protection provided by lesser-included offense instructions is unique in American criminal law.[10] ... [T]he nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard. That safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense-but leaves some doubt with respect to an element that would justify conviction of a capital offense-the failure to give the jury the 'third option' of convicting on a lesser-included offense would seem inevitably to enhance the risk of an unwarranted conviction.
>
> Such a risk cannot be tolerated in a case in which the defendant's life is at stake...
>
> To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion', we

> have invalidated procedural rules that tended to diminish the reliability of the sentencing determination.[13] The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser-included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case.[14]" (Emphasis added) (Citations omitted) Id. at 65 L. Ed. 2d 401, 402, 403.

Thus, the Beck decision, supra, served to strike down as unconstitutional a provision of the Alabama statute on capital murder, which statute, to-wit, Code of Alabama (1975), §13-11-2, et seq., is the same statute under which the instant Petitioner, Phillip Wayne Tomlin, was tried, convicted, and sentenced to die in the electric chair.

The Supreme Court of Alabama ostensibly relying upon this Court's decision in the case of Hopper v. Evans, 456 US 605, 102

Sp. Ct. 2049, 72 L. Ed. 2d 367 (1982), has ruled that application of the Alabama preclusion law whereby a jury was required to decide guilt or innocence of a capital crime without consideration of lesser-included non-capital offenses was not prejudicial to the Petitioner, Phillip Wayne Tomlin, and that the said Petitioner was not therefore entitled to a new trial. The reliance of the Alabama Supreme Court on Hopper v. Evans, supra, is misguided. First, it should be noted that the State of Alabama has heretofore conceded at all stages of the appellate process that the case at bar is clearly distinguishable from the facts in Hopper v. Evans, supra. On that unique and peculiar state of facts, this Supreme Court concluded:

> "It would be an extraordinary perversion of the law to say that intent to kill is not established when a felon engaged in an armed robbery,

> admits to shooting his victim in the back in the circumstances shown here. The evidence not only supported the claim that respondent intended to kill the victim, but affirmatively negated any claim that he did not intend to kill the victim. An instruction on the offense of unintentional killing during this robbery was therefore not warranted." (Emphasis added) Id. at 72 L. Ed. 2d 374.

The court went on to admonish in a footnote, however:

> "In another case with different facts, a defendant might make a plausible claim that he would have employed different trial tactics-for example, that he would have introduced certain evidence or requested certain jury instructions-but for the preclusion clause.

The Petitioner, Phillip Wayne Tomlin, would respectively submit that the case at bar is just the sort of case with different facts which the United States Supreme Court alluded to in the Hopper v. Evans, case, supra. The evidence of record in the case at bar does not conclusively or absolutely

negate the possiblity that the Petitioner, Phillip Wayne Tomlin, never intended a double homocide. Indeed, there was absolutely no evidence that the Petitioner was the trigger man or even present at the time that the two victims were killed. The co-defendant, John Ronald Daniels, might have killed both victims, one of whom the Petitioner never had any intent whatsoever to kill. To prove that Phillip Wayne Tomlin was guilty of capital murder, it was the State of Alabama's burden to prove that the said Petitioner had the "particularized intent" to deliberately kill two or more human beings. Beck v. Alabama, 447 US 625-628, n. 2 (1980); see also Ex Parte Raines 429 So. 2d 1111, 1112-13 (Ala. 1982). Significantly, in the Beck case, supra, the United States Supreme Court made clear that a defendant need not rely solely on his own evidence in order to justify jury instructions on a lesser-included offense,

but has a right, after all the evidence is in, to invoke whatever holes or doubts exist in the State's case to justify such jury instructions. Beck v. State of Alabama, 447 US 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392, 402-403 (1980).

Moreover, there was evidence that the Petitioner was quite distraught over his brother's death, who had been shot and killed by one of the victims, to-wit, Richard Brune, and that the Petitioner, his deceased brother, and the homocide victim Richard Brune, were all involved in abuse of drugs and alcohol, etc. (R. pp. 232, 238, 271-295, 785) (R. pp. 827-830, 835, 846-848, 850 8-18) (R. pp. 921, 1027-1029) The Petitioner would submit that the evidence of record from the first trial would not preclude or affirmatively negate the Petitioner on a new trial from employing new trial tactics and strategy in an effort to convince the jury, for example,that

the Petitioner's mental state at the time of the double homocide was sufficiently poisoned by the drugs, alcohol and grief over his brother's death such that the requisite intent to commit a capital homocide could not be found to exist. When the evidence of record is examined in light of the fact that under the then existing law of Alabama a capital murder defendant had no option of pursuing evidence and/or jury instructions of a lesser-included offense, the prejudice is undeniable. The preclusion clause in this case clearly dictated the trial strategy and tactics adopted by the Petitioner and his attorney, and its operation served to severely prejudice the Petitioner's right to a fair trial; wherein a defendant charged with capital murder can present a defense, including evidence of guilt of a lesser-included offense, without fear that if a capital jury finds a defendant guilty of

any killing, that jury will be required by law to choose between acquitting the defendant of everything or sentencing that defendant to death in the electric chair. It is patently unfair for the Courts to now impose a new and unforeseeable rule of law upon the Petitioner, to-wit, the ex post facto determination of the Alabama Supreme Court that an alibi defense would conclusively preclude the defendant from invoking or introducing evidence of, and obtaining jury instructions on, a lesser-included offense in a new trial. It transgresses the intent of the United States Supreme Court which was enunciated in Beck v. State of Alabama, supra and Hopper v. Evans, supra, and effectively denies the Petitioner his fundamental constitutional right to due process of law.

The decision of the Alabama Supreme

Court in the case at bar is violative of constitutional rights of the Petitioner insofar as the decision fails to follow the dictates of the United States Supreme Court which were expressed in Godfrey v. Georgia, 446 US 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980). Not only has the jury been effectively eliminated from considering aggravating and mitigating circumstances prior to sentencing the defendant, which was held to be constitutionally mandated, in Beck v. State, 396 So. 2d 645, 660-662 (Ala. 1980), but the State of Alabama otherwise failed to prove the alleged aggravating circumstances beyond a reasonable doubt. (R. pp. 174, 175-179, 982-988, 1003-1032)

CONCLUSION

WHEREFORE, the premises considered, the Petitioner, Phillip Wayne Tomlin, respectfully moves this Court to grant his Petition for Writ of Certiorari to the Alabama Supreme Court.

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CERTIFICATE OF SERVICE

I, Richard D. Horne, a member of the bar of the U.S. Supreme Court and Attorney for the Petitioner, do hereby certify that on the 7th day of February and again on the 14th day of March, 1984, I did serve the requisite number of copies of the foregoing to the Clerk of the Supreme Court and the Attorney General for the State of Alabama, Charles Graddick, by placing a copy of same in the United States Mail, properly addressed and first class postage prepaid.

RICHARD D. HORNE

SWORN TO AND SUBSCRIBED
BEFORE ME ON THIS THE
14th DAY OF MARCH,
1984.

NOTARY PUBLIC, STATE AT LARGE

APPENDIX

Opinion of the Alabama Supreme Court on rehearing, which was rendered on December 9, 1983; (Exhibit A)

Alabama Code, (1975) §13-11-1, et seq., (repealed); (Exhibit B)

Alabama Code, (1975) §13-1-70,73,74. (Exhibit C)

United States Constitution, Articles V, VI, VIII, XIV, Section 1. (Exhibit D)

THE STATE OF ALABAMA----------JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1983-1984

Ex parte: Phillip Wayne Tomlin

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(Re: Phillip Wayne Tomlin

79-288 v.

State of Alabama)

ON APPLICATION FOR REHEARING

FAULKNER, JUSTICE

Phillip Wayne Tomlin was convicted under Alabama's 1975 death penalty statute of first degree murder wherein two or more people are intentionally killed by on or a series of acts and of first degree murder done for a pecuniary or other valuable consideration or pursuant to a contract or for hire. Sections 13-11-2 (a)(10) and (7), Code of Alabama (1975) (repealed). The trial court held a sentencing hearing and entered an order setting out its findings as to aggravating and mitigating circumstance and sentencing the defendant to death. On appeal the Court of Criminal Appeals

affirmed the defendant's conviction, but found the trial court's sentencing order defective in several aspects. It entered an order remanding the cause with instructions to the trial court to amend its sentencing order to comply with the Court of Criminal Appeals' decision.

While Tomlin's petition for writ of certiorari was pending before this court, the United States Supreme Court handed down Beck v. Alabama, 447 U.S. 625 (1980), in which it found Alabama's 1975 death penalty statute defective because the preclusion clause in the act prohibited juries from considering any lesser-included offenses. Because we interpreted Beck v. Alabama to require that all defendants theretofore convicted under that statute be granted new trials, we entered an order reversing Tomlin's conviction.

The State filed an application for rehearing in which it asked us to reconsider our interpretation of Beck v. Alabama. While the application for rehearing was pending, the Supreme Court released its opinion in Hopper v. Evans, 456 U.S. 605 (1982). Evans had

been convicted and sentenced to death after testifying that he intentionally shot the proprietor of a pawnshop during a robbery. Because Evans suggested no plausible claim not contradicted by his own testimony at trial which would entitle him to a jury instruction on a lesser-included offense, the Court ruled that he had not been prejudiced by the preclusion clause. It concluded, therefore, that Evans was not entitled to a new trial. Hopper, supra, 456 U.S. at 613-14. We hereby withdraw our previous opinion in this case in order to enter an order in accordance with Hopper and its progeny.

A defendant convicted under §13-11-2 of the 1975 statute is entitled to a new trial because of the preclusion clause in the statute if there was evidence introduced at trial which would have warranted a jury instruction on a lesser-included offense or if the defendant suggests any plausible claim not contradicted by his own testimony which he might conceivably have made which would have entitled him to a jury instruction on a lesser-included offense. Cook v. State, 431 So.

2d 1322, 1324, (Ala. 1983)

Tomlin testified that he was in Texas at the time of the killings. We examined in Cook v. State, supra, the effect of an alibi defense on the question of whether a defendant convicted under the 1975 death penalty statute is entitled to a new trial because of the preclusion clause. We concluded that when a defendant testified that he was in a distant location when the crime was committed, his own testimony directly contradicted any evidence he might have introduced to show that he was guilty of a lesser-included offense. Cook, supra, at 1325.

Cook is clearly controlling here. The petitioner argued that, but for the preclusion clause, he might have introduced evidence that Daniels, who was allegedly with Tomlin at the time in question, did the killing, or that Tomlin intentionally killed only one of the victims, or that Tomlin was under the influence of drugs at the time of the killings. All of the claims suggested by the petitioner are, however, in conflict with Tomlin's own testimony. Tomlin is not,

therefore, entitled to a new trial based on the presence of the preclusion clause in the statute.

Tomlin raised the following additional issues in his petition for writ of certiorari:

(1) Whether counts one and three of the indictment were defective;

(2) Whether the trial court should have refused to allow the State to call a witness omitted from a list of potential witnesses supplied by the State;

(3) Whether the trial court should have granted a motion to exclude as to count two of the indictment which charged the defendant with murder for pecuniary or other valuable consideration or pursuant to a contract or for hire;

(4) Whether the jury charge was sufficient;

(5) Whether the verdict form was sufficient;

(6) Whether the trial court properly responded to questions from the jury as to what would happen in the event of a hung jury.

I

SUFFICIENCY OF COUNTS ONE AND THREE

OF THE INDICTMENT

Tomlin did not file his demurrer to the indictment until after the jury was empaneled. By appearing and entering a plea at his arraignment, the petitioner waived any irregularities in the indictment unless the indictment was so defective that it left the accused unaware of the nature and cause of the charges against him. Canada v. State, 421 So. 2d 140, 145 (Ala. Crim. App. 1982)

Omitting the formal parts of the indictment, count one charges that Tomlin:

> "... did unlawfully, and with malice aforethought kill Richard Brune and Cheryl Moore by, to-wit: on January 2, 1977, at a location on or near Interstate 10 in Mobile County, Alabama, was shot with a gun, (sic) in violation of Act Number 213, Section 2, Sub-Section J (Act #213, §2(j), Acts of Alabama, Regular Session, 1975, against the peace and dignity of the State of Alabama."

Petitioner's contention that count one charged no more than first degree murder of two persons is not

well taken. The capital murder statute does require that the victim be killed by "one or a serioes of acts," an allegation omitted from count one of the indictment. The omission did not, however, leave the defendant unaware of the nature and cause of the charge against him in light of the reference to the death penalty statute by act number in each count of the indictment.

Count three alleged, in pertinent part, that Tomlin:

> "...did unlawfully intentionally, and with malice aforethought kill Richard Brune and Cheryl Moore, by shooting them with a gun, wherein both Richard Brune and Cheryl Moore were intentionally killed by PHILLIP WAYNE TOMLIN by one or a series of acts, in violation of Act Number 213, Section 2, Sub-Section J (Act #213, §2(j) and Act Number 213, Section 6, Sub-Section H (Act #213, §6(h), Acts of Alabama, Regular Session 1975, in that said killings were especially heinous, atrocious or cruel..."

Count three was, if anything, overinclusive. We disagree with petitioner's argument that the State failed to prove that the murders were "especially heinous, atrocious or cruel." The State introduced evidence that Tomlin had planned to kill Ricky Brune for over

nine months. He traveled from Texas to Mobile with a "hit man" for the express purpose of carrying out his plan to kill Brune. Tomlin and Daniels apparently gained entry into the back seat of Brune's car, and then shot not only Brune but also his fifteen-year-old companion in the back with a shotgun and a pistol. We are not inclined to rule as a matter of law that the murders were not especially heinous, atrocious or cruel.

II

FAILURE OF THE STATE TO DISCLOSE THE IDENTITY OF A WITNESS PRIOR TO TRIAL

About nine months prior to the killings, two officers from the Texas Department of Public Safety, operating undercover talked with the petitioner at a night club in Houston, Texas, in connection with an investigation of illegal drug trafficking. During the conversation Tomlin allegedly stated that he intended to go to Alabama to "kill someone." Tomlin was subsequently prosecuted in Texas on a drug charge but was not convicted. His case was nol-prossed after a mistrial.

The trial court in the instant case ordered the State to submit to the defendant list of the witnesses it intended to call at trial. The list included one of the two Texas police officers. At trial the State called both officers, who testified to their conversation with Tomlin. Petitioner objected to the testimony of the unlisted witness, Officer Hebison. On appeal he argued that, had he known Hebison was going to testify, he would have acquired a transcript of the Texas proceedings in order to facilitate his cross-examination of Hebison.

We fail to see how inclusion of both officers' names would have provided any better notice of the need to obtain the Texas transcript than was afforded by the inclusion of one of their names. Both testified to substantially the same facts. If, indeed, there was any error, it was harmless. A.R.A.P. 45.

III

WHETHER A MOTION TO EXCLUDE SHOULD HAVE BEEN GRANTED AS TO COUNT TWO

Count two charged that the killings were done for

pecuniary or other valuable consideration or pursuant to a contract or for hire, in violation of §13-11-2(a)(7), Code of Alabama (1975) (repealed). The trial court submitted all three counts to the jury, which returned a verdict of guilty "as charged in the indictment." The jury, therefore, convicted Tomlin of every crime included in the indictment, including murder pursuant to a contract or for hire.

The Court of Criminal Appeals affirmed, based on the evidence that Tomlin was accompanied by Daniels, whom he introduced as a "hit man." Even though Tomlin did not himself act pursuant to a contract or for hire, there was sufficient evidence to convict him because under Alabama's accomplice statute all persons concerned in the commission of the crime must be indicted, tried, and punished as principals. Section 13-9-1, Code of Alabama, (1975) (repealed).

The petitioner argued that the court's findings in its sentencing order could not be reconciled with the jury verdict. The court's sentencing order states, inter alia, that "the capital felony was not committed for pecuniary gain" and that "Mr. Tomlin was not an

accomplice... but was in fact a principal who was present and assisted in the commission of the double homicide."

The finding that Tomlin did not act for pecuniary gain was not at odds with the theory that he hired Daniels as his "hit man" and was, therefore, liable as Daniels's accomplice. The court's finding that Tomlin was not an accomplice but was present and assisted in the killings is incongruous on its face. If Tomlin assisted Daniels in the killings he was, by definition, Daniels's accomplice. The finding in question was made with reference to §13-11-7(4), Code of Alabama (1975) (repealed), which provides that it is a mitigating circumstance to be considered in sentencing the defendant if the defendant was an accomplice whose participation was relatively minor. The court was apparently attempting to state that Tomlin was not an accomplice whose participation was relatively minor, but simply omitted that crucial language. At any rate, the issue is moot. The Court of Criminal Appeals ruled that the finding in question

was"defective" and ordered that the cause be remanded for a correction of the sentencing order. Objections based on the content of the sentencing order should be raised after remandment.

IV

SUFFICIENCY OF THE JURY CHARGES

On appeal petitioner argued, for the first time, that the elements of premeditation, unlawfulness, and malice aforethought should have been included in the charge. Failure to include these elements, he argued, constituted plain error which affected his substantial rights. A.R.A.P. 39(k).

We disagree. The oral charge must be judged within the context of the facts in dispute. VanAntwerp v. State, 358 So. 2d 782, 786 (Ala. Crim. App.), cert. denied, 358 So. 2d 791 (Ala. 1978) There was no dispute as to whether the killings were premeditated, unlawful, and done with malice aforethought. Tomlin either carried out the brutal, execution-style killings after months of planning or he was in Texas at the time of the killings and had no knowledge of them. There was

no evidence to suggest accident, passion, justification, or provocation.

V

SUFFICIENCY OF THE VERDICT FORM

Although he did not object to the verdict form which was offered to the jury, petitioner now argues that there was a fatal variance between the indictment and the jury verdict, which read:

> "We, the jury, find the defendant guilty of murder as charged in the indictment and fix the punishment at death."

The same argument with regard to a verdict form which was virtually identical to the one in the case at bar was rejected in Johnson v. State, 399 So. 2d 859, 865 (Ala. Crim. App.), affirmed in part, reversed in part on other grounds, 399 So. 2d 873 (Ala. 1979) That case is controlling.

VI

THE COURT'S INSTRUCTIONS REGARDING A MISTRIAL

After the jurors had deliberated some four hours, they returned with several questions, the second of which was:

"What happens if there is a hung jury?"

The Court replied:

> "Well, I'm going to answer your first question first--I mean your second question first. Under our legal system in the event that you people cannot reach a unanimous verdict it would be incumbent upon this Court to declare a mistrial, which in effect means that approximately six to eight to twelve weeks from now another jury would be empaneled, another jury would hear the exact same charge that you heard and then it would be submitted to that jury. Okay?"

Although he did not object at trial, the petitioner argued on appeal that it was plain error for the court not to instruct the jury of the possibility that Tomlin could have been reindicted and tried for non-capital murder.

It is true that the option mentioned by the petitioner would have been open to the State in the event of a mistrial. For that matter, the State could have dropped all charges against the defendant. Looking at the instruction from Tomlin's vantage point when the question was asked, an instruction which fully set out all alternatives open to the

State, including the State's option to nol-pros the case, would have been as likely to harm as to benefit the defendant. Petitioner cannot, after waiving his objection at trial, bring the matter up on appeal.

The decision of the Court of Criminal Appeals is hereby affirmed.

APPLICATION GRANTED; OPINION OF AUGUST 28, 1981 WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED

Torbert, C.J., Maddox, Jones, Shores, Embry, Beatty and

Adams, JJ., concur.

Almon, J., not sitting.

§13-11-1. Limitation on imposition of death penalty or life sentence without parole.

Except in cases enumerated and described in section 13-11-2, neither a court nor a jury shall fix the punishment for the commission of treason, felony or other offenses at death, and the death penalty or a life sentence without parole shall be fixed as punishment only in the cases and in the manner herein enumerated and described in section 13-11-2. In all cases where no aggravated circumstances enumerated in section 13-11-2 are expressly averred in the indictment, the trial shall proceed as now provided by law, except that the death penalty or life imprisonment without parole shall not be given, and the indictment shall include all lesser offenses. (Acts 1975, No. 213, §1.)

§13-11-2. Aggravated offenses for which death penalty to be imposed; felony-murder doctrine not to be used to supply intent; discharge of defendant upon finding of not guilty; mistrials; reindictment after mistrial.

(a) If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses:

(1) Kidnapping for ransom or attempts thereof, when the victim is intentionally killed by the defendant;

(2) Robbery or attempts thereof when the victim is intentionally killed by the defendant;

(3) Rape when the victim is intentionally killed by the defendant; carnal knowledge of a girl under 12 years of age, or abuse of such

girl in an attempt to have carnal knowledge when the victim is intentionally killed by the defendant;

(4) Nighttime burglary of an occupied dwelling when any of the occupants is intentionally killed by the defendant;

(5) The murder of any police officer, sheriff, deputy, state trooper or peace officer of any kind, or prison or jail guard while such prison or jail guard is on duty or because of some official or job-related act or performance of such officer or guard;

(6) Any murder committed while the defendant is under sentence of life imprisonment;

(7) Murder in the first degree when the killing was done for a pecuniary or other valuable consideration or pursuant to a contract or for hire;

(8) Indecent molestation of, or an attempt to indecently molest, a child

under the age of 16 years, when the child victim is intentionally killed by the defendant;

(9) Willful setting off or exploding dynamite or other explosive under circumstances now punishable by section 13-2-60 or 13-2-61, when a person is intentionally killed by the defendant because of said explosion;

(10) Murder in the first degree wherein two or more human beings are intentionally killed by the defendant by one or a series of acts;

(11) Murder in the first degree where the victim is a public official or public figure and the murder stems from or is caused by or related to his official position, acts or capacity;

(12) Murder in the first degree committed while the defendant is engaged or participating in the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration

for the release of said aircraft or any passenger or crewman thereon, or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

(13) Any murder committed by a defendant who has been convicted of murder in the first degree or second degree in the 20 years preceding the crime; or

(14) Murder when perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing of witness, or when perpetrated against any human being while intending to kill such witness.

(b) Evidence of intent under this section shall not be supplied by the felony-murder doctrine.

(c) In such cases, if the jury finds the defendant not guilty, the defendant must be discharged. The court may enter a judgment

of mistrial upon failure of the jury to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the defendant may be tried again for the aggravated offense, or he may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance. If the defendant is reindicted for an offense wherein the indictment does not allege an aggravated circumstance, the punishment upon conviction shall be as heretofore or hereafter provided by law; however, the punishment shall not be death or life imprisonment without parole. (Acts 1975, No. 213, §2.)

§13-11-3. Hearing as to imposition of death penalty or life sentence without parole after conviction; admissibility of evidence, right of state and defendants to present arguments.

If the jury finds the defendant guilty of one of the aggravated offenses listed in section 13-11-2 and fixes the punishment at

death, the court shall thereupon hold a hearing to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole. In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; provided further, that this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of Alabama. The state and the defendant, or his counsel, shall be permitted to present argument for or against the sentence of death. (Acts 1975, No. 213, §3.)

§13-11-4. Determination of sentence by court; court not bound by punishment fixed by jury.

Notwithstanding the fixing of the punishment at death by the jury, the court, after weighing the aggravating and mitigating circumstances, may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole, which shall be served without parole; or the court, after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death. If the court imposes a sentence of death, findings of fact from the trial and the sentence hearing, which shall at least include the following:

(1) One or more of the aggravating circumstances enumerated in section 13-11-6, which it finds exists in the case and which it finds sufficient to support the sentence

of death; and

(2) Any of the mitigating circumstances enumerated in section 13-11-7 which it finds insufficient to outweigh the aggravating circumstances. (Acts 1975, No. 213, §4.)

§13-11-5. Conviction and sentence of death subject to automatic review.

The judgment of conviction and sentence of death shall be subject to automatic review as now required by law. (Acts 1975, No. 213, §5.)

§13-11-6. Aggravating circumstances.

Aggravating circumstances shall be the following:

(1) The capital felony was committed by a person under sentence of imprisonment;

(2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to many persons;

(4) The capital felony was committed

while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping for ransom;

(5) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital felony was committed for pecuniary gain;

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

(8) The capital felony was especially heinous, atrocious or cruel. (Acts 1975, No. 213, §6).

§13-11-7. Mitigating circumstances.

Mitigating circumstances shall be the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

(7) The age of the defendant at the time of the crime. (Acts 1975, No. 213, §7)

§13-11-8. Appointment of experienced counsel for indigent defendants.

Each person indicted for an offense punishable under the provision of this chapter who is not able to afford legal counsel must be provided with court appointed counsel having no less than five years' prior experience in the active practice of criminal law. (Acts 1975, No. 213, §8)

§13-11-9. Effective date.

This chapter shall become effective on March 7, 1976. (Acts 1975, No. 213, § 10).

§13-1-70. Degrees of murder.

Every homicide perpetrated by poison, lying in wait or any other kind of wilful, deliberate, malicious and premeditated killing; or committed in the perpetration of, or the attempt to perpetrate, any arson, rape, robbery or burglary, or death of any human being other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others and evidencing a depraved mind regardless of human life, although without any preconceived purpose to deprive any particular person of life, is murder in the first degree; and every other homicide committed under such circumstances as would have constituted murder at common law is murder in the second degree. (Code 1852, §111; Code 1867, §3653; Code 1876, §4295; Code 1886, §3725; Code

1896, §4854; Code 1907, §7084, Code 1923, §4454; Code 1940, T. 14, 314.)

§13-1-73. Jury to find degree.

When the jury finds the defendant guilty under an indictment for murder, they must ascertain by their verdict whether it is murder in the first or second degree; but if the defendant on arraignment confesses his guilt, the court must proceed to determine the degree of the crime, by the verdict of a jury, upon an examination of the testimony, and pass sentence accordingly. (Code 1852, §115)

§13-1-74. Punishment-Generally.

Any person who is guilty of murder in the first degree shall, on conviction, suffer imprisonment in the penitentiary for life, unless otherwise specified by law; and any person who is guilty of murder in the second degree shall, on conviction, be imprisoned in the penitentiary for not less than 10

years, at the discretion of the jury. (Code 1852, §112; Code 1867, §3654; Code 1876, §4296; Code 1886, §3729; Code 1896, §4858; Code 1907, §7088; Code 1923, §4458; Code 1940, T. 14, 318.)

UNITED STATES CONSTITUTION
ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE [VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been

committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARTICLE [VIII]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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83-1533

Docket No. _____

IN THE

Supreme Court of the United States

October Term 1983

PHILLIP WAYNE TOMLIN,
Petitioner,

vs.

STATE OF ALABAMA,
Respondent.

Supplemental Appendix

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Counsel For Petitioner

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SUPPLEMENTAL APPENDIX

Opinion of the Alabama Court of Criminal Appeals, which was rendered on November 20, 1979; Rehearing denied, December 18, 1979. (Exhibit E)

PHILLIP WAYNE TOMLIN

V.

STATE

1 DIV. 23.

COURT OF CRIMINAL APPEALS OF ALABAMA.

Nov. 20, 1979.

REHEARING DENIED Dec. 18, 1979.

BOOKOUT, Judge.

Murder in the first degree wherein two or more human beings are intentionally killed, and murder in the first degree when the killing was done for a pecuniary or other valuable consideration or pursuant to a contract or for hire; sentence: death by electrocution.

The State's evidence was sufficient to justify appellant's conviction even though there was no eyewitness testimony concerning the double killings. It is therefore unnecessary for the purposes of this appeal to

narrate a detailed account of the brutal and calculated murders contained in the voluminous record before us. Briefly, the facts are as follows:

At approximately 5:30 p.m. on January 2, 1977, at the Theodore-Dawes Exit to Interstate 10 in Mobile, nineteen-year-old Ricky Brune and fifteen-year-old Cheryl Moore were found dead in the front seat of Brune's car. Their deaths resulted from multiple gunshot wounds in the back from a sixteen-gauge shotgun and a .38 caliber pistol. The fatal shots were fired from inside the car from the rear seat. An unoccupied 1968 Ford had been spotted parked at the exit with the motor running at 4:50 p.m.

The appellant and his "partner", John Ronald Daniels, had arrived in Mobile at Randy and Danny Shanks' trailer the night before between 11:30 and 12:00 p.m. after travelling

from Houston, Texas. The Shankses were the appellant's brother-in-law. The appellant introduced Daniels as his "hit man" and told the Shankses "he had come to Mobile to get revenge...on the guy that killed his brother...[that] he was going to kill the person who killed his brother." The appellant's brother had been killed as a result of an accidental shotgun discharge which involved Ricky Brune on November 25, 1975.

After midnight on January 2, Randy Shanks rented a room at the Eight Days Inn for appellant and Daniels. Inside the motel room the appellant and Daniels showed the Shankses the .38 and .44 caliber pistols and a disassembled sixteen-gauge shotgun. The weapons were kept in a satchel. Later, the appellant drove the Shankses back to their trailer and asked Danny if he could use his

car "the next day to get out of town." Danny told him no, that he "didn't want to get involved in it." The appellant was driving his sister's 1968 Ford.

The appellant and his "hit man" Daniels were first seen in Mobile between 3:00 and 4:00 p.m. the afternoon of the murders at the Highway 90 Lounge located two miles north of the Theodore-Dawes Exit. Outside the lounge inside his sister's car, the appellant had conversations with the Shanks brothers and James Stokes. The appellant was next seen in Houston, Texas, late that night. His sister's 1968 Ford was found abandoned at the New Orleans International Airport.

I

The appellant contends that Counts 1 and 3 of the indictment were defective and that his demurrer to those counts should have been granted. We do not agree. Omitting the

formal parts, the indictment charges that the appellant Phillip Wayne Tomlin:

> "...did unlawful, intentionally, and with malice aforethought kill Richard Brune and Cheryl Moore by, to-wit: on January 2, 1977, at a location on or near Interstate 10 in Mobile County, Alabama, was shot with a gun, in violation of Act Number 213, Section 2, Sub-Section J (Act #213, Section 2(j)), Acts of Alabama, Regular Session, 1975, against the peace and dignity of the State of Alabama. "...did unlawfully, intentionally, and with malice aforethought kill Richard Brune and Cheryl Moore by shooting Richard Brune and Cheryl Moore with a gun, said killings were done for a pecuniary or other valuable consideration, or pursuant to a contract or for hire, in violation of Act Number 213, Section 2, Sub-Section G (Act #213, Section 2(g)), Acts of Alabama, Regular Session, 1975, against the peace and dignity of the State of Alabama.
>
> "...did unlawfully, intentionally, and with malice aforethought kill Richard Brune and Cheryl Moore, by shooting them with a gun, wherein both Richard Brune and Cheryl Moore were intentionally killed by PHILLIP WAYNE TOMLIN by one or a series of acts, in violation of Act Number 213, Section 2, Sub-Section J (Act #213, Section 2(j) and Act Number 213, Section 6, Sub-Section

H (Act #213, Section 6(h)), Acts of Alabama, Regular Session, 1975, in that said killings were especially heinous, atrocious or cruel..."

[1] Appellant pled not guilty to the charges at his arraignment on October 13, 1977. He reserved the right to file special pleas within twenty days. Appellant did not file his demurrer to the indictment until March 20, 1978, after the jury had been empaneled. We hold that appellant's indictment was not subject to demurrer, and in any event the delay in filing constituted a waiver.

Recently we reaffirmed long standing principles recognized by this court and the Alabama Supreme Court by holding the following:

"Generally, a demurrer is the proper procedure to raise defects in an indictment. Andrews v. State, 344 So. 2d 533 (Ala. Cr. App.), cert denied, 344 So. 2d 538 (Ala.

1977) Since a plea to the merits admits the validity of an indictment, a demurrer filed after arraignment and after a plea of not guilty is properly stricken. Underwood v. State, 248 Ala. 308, 27 So. 2d 492 (1946). The right to file a demurrer is waived unless the demurrer is filed before a plea to the merits. Holloway v. State, 37 Ala. App. 96, 64 So. 2d 115, cert. denied, 258 Ala. 558, 64 So. 2d 121 (1953). If an indictment is merely voidable and subject to demurrer, the failure to demur will prevent appellate review of the indictment's short comings. Williams v. State, 333 So. 2d 610 (Ala. Cr. App.), affirmed, 333 So. 2d 613 (Ala. 1976)." Edwards v. State, 379 So. 2d 336 (Ala. Cr. App. 1979).

[2,3] Of course if an indictment is void as opposed to voidable, as where the indictment does not on its face charge an offense, or where the accused is left unaware of the nature and cause of the charge against him, this court is bound to take notice of such defect even in the absence of an objection. Edwards, supra; Davidson v. State, 351 So. 2d

683 (Ala. Cr. App. 1977); Fitzgerald v. State, 53 Ala. App. 663, 303 So. 2d 162 (1974). If the indictment had been void rather than voidable, the defect would have been reached by the appellant's request for an affirmative charge. Edwards, supra; Coker v. State, 18 Ala. App. 550, 93 So. 384 (1922). The defect could have been preserved by a motion in arrest of judgment. Francois v. State, 20 Ala. 83 (1852)

[4] In the instant case, however, each count of the indictment stated an offense in such a manner as to apprise appellant of the nature of the charges against him. We hold, therefore, that the indictment was not void on its face and that the trial court was correct in overruling the untimely demurrer.

[5] Even had the demurrer been

timely filed, we hold that the faulty grammar in Count 1 was not objectionable.

"Before an objection because of false grammar, incorrect spelling, or mere clerical errors is entertained, the court should be satisfied of the tendency of the error to mislead, or to leave in doubt the meaning of the charge to a person of common understanding, reading, not for the purpose of finding defects, but to ascertain what is intended to be charged. Grant v. State, 55 Ala. 201 (1876). Neither clerical nor grammatical errors vitiate an indictment unless they change the words or obscure the meaning, Grant, supra, or unless the error changes a word into one of different import or the sense is so obscure that one of ordinary intelligence cannot determine with certainty the meaning from the context. Sanders v. State, 2 Ala. App. 13, 56 So. 69 (1911)..."

Cook v. State, 369 So. 2d 1243 (Ala. Cr. App. 1977), affirmed in part, reversed in part on other grounds, 369 So. 2d 1251 (Ala. 1978).

The sense of Count 1 in the indictment is clear. The grammatical error did not obscure the sense of what was intended to

be charged.

[6] Contrary to appellant's argument that Count 1 of the indictment charges no more than the first degree murder of two persons, we hold that the requisite language of Section 13-11-2(a)(10), Code of Ala. 1975, is sufficiently followed to charge a capital offense. The Alabama Supreme Court has specifically held that the capital offense expressed in Section 13-11-2(a)(10) is murder aggravated by two or more individuals being killed. Ex parte Clements, 370 So. 2d 723, 726 (Ala. 1979). It is thus distinguishable from traditional noncapital first degree murder.

[7] It was proper that each count allege tht the killings were done "unlawfully, intentionally,, and with

malice aforethought," elements of the first degree murder statute, rather than solely done intentionally. Section 13-11-2(a)(10) requires proof of (1) murder in the first degree (2) wherein two more more people are intentionally killed by the defendant. Thus first degree murder and an intentional killing must be alleged and proved under the instant statute.

[8-10] Count 3 of the indictment was likewise not subject to demurrer for concluding that "said killings were especially heinous, atrocious or cruel"-language found in Section 13-11-6(8). That language was mere surplusage to the first part of Count 3 which properly charged a capital offense under Section 13-11-2(a)(10). As early cases have held, unnecessary averments in

an indictment do not impair its validity. The most that can result from them is to hold the prosecution to the proof of them. Aaron v. State, 39 Ala. 75 (1863). Johnson v. State, 35 Ala. 363 (1860); Lindsay v. State, 19 Ala. 560 (1851). Surplusage does not vitiate an indictment otherwise good. McDaniel v State, 20 Ala. App. 407, 102 So. 788, cert. denied, 212 Ala. 415, 102 So. 791 (1924). As long as the remaining portions of an indictment validly charge a crime, the existence of surplusage will not affect the validity of a conviction. United States v. Hyde, 448 F. 2d 815 (5th Cir.), cert. denied, 404 U.S. 1058, 92 S. Ct. 736, 30 L. Ed. 2d 745 (1971).

II

Appellant contends that the trial court erred in failing to exclude the

State's evidence relating to Count 2 of the indictment. Appellant correctly maintains that the State presented no evidence that the appellant himself committed the killings for pecuniary gain or pursuant to a contract or for hire. It is thus argued that appellant's motion to exclude the State's evidence for failure to prove a prima facie case under Count 2 of the indictment should have been granted.

In addition, the trial court at the sentence hearing specifically found that the killings were not committed for pecuniary gain and also that the appellant was not an accomplice, but was an actual participant in the murders. It is argued that the trial court's determination after the sentence hearing that the killings were not committed for

pecuniary gain is in direct conflict with his denial to exclude the State's evidence as to Count 2 of the indictment at the trial. The above two contentions, while logical and persuasive, must fail. We shall address appellant's arguments separately.

A

[11] The evidence clearly demonstrated that John Ronald Daniels, appellant's "partner," was a "hit man." Appellant had come to Mobile to get "revenge" for the death of his brother. The inference is clear that appellant's "partner" Daniels was to commit the killings pursuant to a contract or for hire. This evidence decidedly falls within the parameters of a murder done for pecuniary gain or pursuant to a contract or for hire as defined in

Section 13-11-2(a)(7), Code of Ala. 1975.

[12] It does not matter that the appellant himself did not commit the murders. A jury question was presented as to whether appellant was Daniels' accomplice. The jury was correctly charged on the law regarding accomplice participation in a crime.

Under the accomplice statute, Section 13-9-1, Code of Ala. 1975:

"The distinction between an accessory before the fact and a principal, between principals in the first and second degrees, in cases of felony, is abolished; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense or aid or abet in its commission, though not present, must hereafter be indicted, tried and punished as principals, as in the case of misdemeanors." (Emphasis added.)

The applicability of the accomplice statute to the death penalty statute has been discussed in Colley v. State, 405

So. 2d 374 (Ala. Cr. App. 1979); in a special concurrence in Ritter v. State, 375 So. 2d 266 (Ala. Crim. App. 1978); and by the Alabama Supreme Court in Ritter v. State, 375 So. 2d 270 (Ala. 1979). A general verdict of "guilty of murder as charged in the indictment" was returned by the jury. Conceivably the jury could have found appellant guilty under count 2 of the indictment. We find that the accomplice statute is applicable to sustain the verdict in the instant case.

[13] The circumstantial evidence was ample for the jury to have found that the appellant was an active participant in the murders and that he was present at the scene of the murders with a view to render aid to Daniels as it became necessary. Where the evidence presented

raises questions of fact for the jury and such evidence, if believed, is sufficient to sustain a conviction, the denial of a motion to exclude the State's evidence does not constitute error. Young v. State, 283 Ala. 676, 220 So. 2d 843 (1969). Thus by way of the accomplice statute, Count 2 of the indictment was properly allowed to remain before the jury for their consideration. We do not say that the jury found the appellant guilty under Count 2, only that they properly had the option of so finding.

B

As to the second part of appellant's argument, we hold that the trial court could properly have found at the sentence hearing in considering the aggravating and mitigating circumstances that the killings were not committed for pecuniary

gain and that the appellant was not an accomplice to the murders. Sections 13-11-6(6) and 13-11-7(4), Code of Ala. 1975. This is so despite the fact that the trial court had previously given the jury the option of deciding these same questions of fact by properly allowing, as we have determined, Count 2 to remain before the jury for their consideration. This seemingly anomalous result is peculiar to the death penalty statute and is explained as follows.

[14, 15] A basic legislative concern underlying our death penalty statute is that the sentence hearing be kept separate and apart from the trial itself and from any jury input as to the ultimate sentence to be imposed which is either death or life without parole. Section 13-11-3, Code of Ala. 1975. The

sentence hearing is conducted by the trial court sitting alone and only upon a prior jury determination at the trial that the accused is guilty of a capital offense. Such a prior determination of guilt by the jury carries an automatic death sentence; the jury input stops at that point. Boiled down to its essence, the sentence hearing is designed in theory to benefit the accused by allowing the trial court to reduce his sentence from death to life without parole when the mitigating circumstances so require. The trial court in effect is allowed to act as a sentence reducer if it finds sufficient mitigating circumstances. Sections 13-11-3 and 13-11-4.

The sentence hearing is further differentiated from the trial by what evidence is allowed to be presented.

"...In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in Sections 13-11-6 and 13-11-7. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; provided further, that this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the state of Alabama...." (Emphasis added.) Section 13-11-3, Code of Ala. 1975.

By definition the trial court is to have the latitude and discretion as to what matters may be presented and considered at the hearing. Specifically the trial court is not limited by the exclusionary rules of evidence it is required to adhere to during the actual trial. In short the trial court at the sentence hearing is allowed substantive and procedural flexibility which is generally

prohibited during the jury trial.

Thus it is a natural consequence that the trial court having at hand not only the benefit of the facts garnered at the trial, but also the "relevant" and "probative" matters gleaned at the sentence hearing, may make findings of fact which include aggravating and mitigating circumstances which are seemingly at odds with the prior jury determination. Nonetheless, unless a clear abuse of discretion is shown, the trial court's findings of fact will be upheld.

[16] In the case at bar there was sufficient evidence for Count 2 of the indictment to have remained before the jury. This was so by way of the accomplice statute. However, as previously stated, Counts 1 and 3 were in

no way connected with a killing for pecuniary gain, nor under those counts was there the necessity of finding that the appellant was an accomplice. Thus, if after the trial and sentence hearing the trial court independently determined that the murders were accomplished pursuant to the charges in Counts 1 and 3 and not Count 2, it was entirely within the trial court's discretion to find that the killings were not committed for pecuniary gain and that the appellant was not an accomplice. Further discussion regarding the trial court's findings of fact after the sentence hearing will be necessary later in this opinion, but for the purpose of this issue we find no abuse of discretion.

III

Prior to trial the appellant filed a

"Motion to Require District Attorney to Disclose Evidence." Side bar colloquy by the assistant district attorney regarding State evidence which he considered would be a "bomb" or "big surprise" prompted this motion. The trial court granted the motion and ordered the district attorney's office "to submit to the attorneys for the defendant a list of all witnesses which have been subpoenaed and a list of all witnesses who will be subpoenaed."

At trial the State called their "bomb," Eddie Hebison, a narcotics officer for the state of Texas. Officer Hebison's name was not included on the list of witnesses submitted by the State which included thirty-four names. Officer Hebison's testimony was basically that on March 19, 1976, he went to the

"Wet and Wild Lounge" in Houston, Texas, working as cover for his partner, David Hammonds, who was to arrange a drug transaction with the appellant. While sitting at a table with his back to Agent Hammonds and appellant, he heard appellant tell Hammonds "that he would not do any larger drug transaction with him at this time because he was going to Alabama to take care of some family business and kill someone there, and that he had learned that his brother's killing had not been an accident, that it was-that he he had been murdered with a sawed-off shotgun in a drug rip off deal." Appellant did sell a small quantity of marijuana and methamphetamine to Agent Hammonds at that time. In a Texas trial that resulted in a hung jury, Officer Hebison testified against

appellant as to that sale in Texas.

Appellant maintains that reversible error occurred when the State called Officer Hebison whose name was not included on the list of witnesses which the court had ordered to be turned over. Appellant contends that had Hebison's name been included the Texas transcript concerning the drug case could have been obtained. Without the Texas transcript, appellant argues he was not able to effectively impeach Hebison and that his right to cross-examination was impaired. We do not agree.

[17] While this court will not sanction disregard of a court order, we have been cited to no authority which would require the State to submit to an accused a list of all the witnesses it expects to call at the accused's trial.

In Thigpen v. State, 49 Ala. App. 233, 270 So. 2d 666, 671 (1972), this court stated:

"...we do not deem the constitutional right to compulsory process in a criminal case to operate in such a manner as to compel pretrial discovery as to who in fact are witnesses for the State. Rather, the law assumes that defense counsel will act with due diligence so as to have such witnesses as necessary available at trial. Then, by way of compulsory process for obtaining such witnesses, the defendant is secured of a proper presentation of his case at trial...."

In Dolvin v. State, 51 Ala. App. 540 287 So. 2d 250 (1973), fifteen witnesses were listed on the docket sheet at least three days before trial. This represented two-thirds of the witnesses called by the State. This court in Dolvin, relying in part on the Thigpen decision, held that knowledge of the identity of the fifteen witnesses could have furnished the defense counsel

with some indication of the remaining eight witnesses which were called. In Thigpen and Dolvin it was pointed out that the defendant had ample opportunity for a thorough and extensive cross-examination.

[18] In the case at bar the appellant conducted a thorough and sifting cross-examination of Officer Hebison. In addition, Officer Hebison's partner, David Hammonds, was included on thewitness list submitted by the State. He, too, had testified in the Texas drug case. Thus access to the Texas transcript, for whatever conceivable defense purpose it might have served, could have been obtained by notice that Hammonds was going to be called as a State witness. Furthermore, Agent Hammonds was called in the instant case

and testified to substantially the same facts regarding his conversation with the appellant in the "Wet and Wild Lounge". Thus Hebisons' testimony was fully corroborated by an "anticipated" witness. Therefore, the absence of Officer Hebison's name from the State's witness list was harmless at most. ARAP, Rule 45.

IV

After the jury had deliberated approximately four hours, they returned with questions for the court. From the record the following exchange occurred:

"FOREMAN: The question-we had two questions, really. We'd like to hear a restatement of your charge, and the second question is what happens if there is a hung jury?
"THE COURT: Well, I'm going to answer your first question first. I mean your second question first. Under our legal system in the event that you people cannot reach a unanimous

verdict it would be incumbent upon this Court to declare a mistrial, which in effect means that approximately six to eight to twelve weeks from now another jury would be empaneled, another jury would hear the exact same evidence that you heard, would hear the exact same charge that you heard and then it would be submitted to that jury...."

The appellant contends that this charge was erroneous. No exception was taken to this charge. Appellant relies on the "plain error" rule for his preservation of error. ARAP, Rule 45A.

Section 13-11-2(c), Code of Ala. 1975, states the course to be followed in the event of a mistrial in a capital felony: "...The court may enter a judgment of mistrial upon failure of the jury to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the defendant may be tried again for the aggravated offense, or he may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance. If the defendant is reindicted for an offense wherein the indictment does not allege an aggravated circumstance, the punishment upon conviction shall be as heretofore or hereafter provided by law; however, the

punishment shall not be death or life imprisonment without parole."

Appellant asserts that the court's failure to apprise the jury of the option contained in Section 13-11-2(c) was prejudicial.

Although the trial court's answer to the jury's question did not comprehensively track all the language of Section 13-11-2(c), we hold that the instruction given (or lack of option apprisal) did not constitute "plain error" within the meaning of ARAP, Rule 45A. For that rule to apply there must first be error, and it must be plainly visible in the record. Colley, supra. Here, the trial court's instruction was correct so far as it went. It did not misstate the law. That "another jury could hear the exact same evidence" and "would hear the exact same

charge" in the event of a hung jury was a very real possibility and indeed a probability. We note that the trial court's response in no way curbed the jury's right to fail to decide appellant's fate. A "hung jury" could still easily have occurred.

[19] Moreover the "option" to reindict the appellant at a later time for a noncapital offense rested entirely with the State. The "option" would at no time become the "appellant's option." It is sheer speculation whether the jury would have failed to reach a unanimous verdict had they been informed of the State's option. It is further speculation whether the appellant would have been reindicted for a noncapital offense in any event. This court will not base its opinion on speculation or

surmise. Thus on this issue we are required to decide whether an omission in the trial court's instruction in response to the jury question effectively deprived appellant of his right to a fair trial free from prejudice. We do not believe that it did. Where a trial court's instruction to the jury is not as full as counsel desires, his remedy is to request written charges covering the matter omitted. Smith v. State, 262 Ala. 584, 80 So. 2d 307 (1955). Here, counsel for appellant neither excepted nor requested further instructions to the jury. Accordingly, we hold the "plain error" rule inapplicable in this instance.

V

Several questions are raised concerning the trial court's order after

the sentence hearing was conducted. For the sake of clarity we set forth the entire order of the court sentencing the appellant to death:

"The Court having conducted a hearing pursuant to Title (sic) 13-11-3 of the Code of Alabama, to determine whether or not the Court will sentence Mr. Phillip Wayne Tomlin to death or to life imprisonment without parole, and the Court having considered the evidence presented at the trial and at said sentencing hearings; the Court makes the following findings of fact:

"The Court first considers the aggravating circumstances as outlined and described in Title 13-11-6:
"(a) The Court finds that the Capital Felony was committed by Phillip Wayne Tomlin or that he was present at and assisted in the commission of the Capital Felony;
"(b) The Court finds no evidence that Mr. Phillip Wayne Tomlin was previously convicted of another Capital Felony. However the Court finds that the Defendant has been in and out of trouble with the police on prior occasions;
"(c) The Court finds that other than set out above in subparagraph (b); there is no evidence that the Defendant did knowingly create a great risk of

death to many persons;
"(d) The Court finds the Capital Felony was committed while the Defendant was engaged in the commission of a double homicide in violation of Title (sic) 13-11-10;
"(e) The Court finds the Capital Felony was not committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;
"(f) The Court finds the Capital Felony was not committed for pecuniary gain, within the meaning of Title (sic) 13-11-6(6) of the Code of Alabama.
"(g) The Court finds the Capital Felony was not committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;
"(h) The Court finds that Phillip Wayne Tomlin killed or participated in the double murder of Cheryl Moore, a teenager of fifteen years of age, and Richard Brune, a teenager of nineteen years of age, at the Interstate 10 Highway Exit Ramp at Theodore-Dawes, Mobile County, Alabama.

"It is the judgment of the Court that the Capital Felony was especially heinous, atrocious, or cruel.

"The Court now considers mitigating circumstances as described and set out in Section 13-11-7, Code of Alabama.

"(a) The Court finds that Phillip Wayne Tomlin has a history of prior criminal activity;
"(b) The Court finds that the Capital Felony itself was not committed while

Phillip Wayne Tomlin was under the influence of extreme mental or emotional disturbance;

"(c) The Court finds that the victims were not a participant in Phillip Wayne Tomlin's conduct, and did not consent to the act.

"(d) the Court finds that Mr. Tomlin was not an accomplice in the Capital Felony committed, but was, in fact a principal who was present and assisted in the commission of the double homicide.

"(e) The Court finds that Phillip Wayne Tomlin did not act under extreme duress or under the substantial domination of another person.

"(f) The Court finds that the capacity of Phillip Wayne Tomlin to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired.

"The Court having considered the aggravating circumstances and the mitigating circumstances and after weighing the aggravating and mitigating circumstances, it is the judgment of the Court that the aggravating circumstances far outweigh the mitigating circumstances and that the death penalty as fixed by the Jury should be and is hereby accepted.

"It is therefore considered and adjudged by the Court that Phillip Wayne Tomlin is guilty of the Capital Felony charged in the indictment, and specifically of intentionally killing Cheryl Moore and Richard Bruno during the commission of a double murder.

"It is therefore ordered and adjudged that you, Phillip Wayne Tomlin, suffer death by electrocution at any time before the hour of sunrise on the 8th day of March, 1979, inside the walls of the William C. Holman Unit of the Prison System at Atmore, Alabama, in a room arranged for the purpose of electrocuting convicts sentenced to death by electrocution.

"It is therefore further ordered and adjudged by the Court that the Warden of William C. Holman Unit of the Prison System at Atmore, or in the case of his death, disability, or absence, his Deputy, or in the event of the death, disability, or absence of both the Warden and his Deputy the person appointed by the Commissioners of Corrections, at any time before the hour of sunrise shall on the 8th day of March, 1979, inside the walls of the William C. Holman Unit of the Prison System at Atmore, in a room arranged for the purpose of electrocuting convicts sentenced to death by electrocution, cause to pass through the body of said Phillip Wayne Tomlin, a current of electricity of sufficient intensity to cause his death, and the continuance and application of such current through the body of the said Phillip Wayne Tomlin until the said Phillip Wayne Tomlin be dead, and may Almighty God have mercy on Your Soul."

[20, 21] It is argued that certain aggravating circumstances found by the

trial court in the above order are not aggravating circumstances as defined in Section 13-11-6, Code of Ala. 1975. We agree. A basic rule of review in criminal cases is that criminal statutes are to be strictly construed in favor of those persons sought to be subjected to their operation, i.e. defendants. Ex parte Clements, 370 So. 2d 723 (Ala. 1979); Schenher v. State, 38, Ala. App. 573, 90 So. 2d 234, cert. denied, 265 Ala. 700, 90 So. 2d 238 (1956). Penal statutes are to reach no further in meaning than their words. Clements, supra; Fuller v. State, 257 Ala. 502, 60 So. 2d 202 (1952).

[22-24] The first aggravating circumstance listed by the trial court, "that the Capital Felony was committed by Phillip Wayne Tomlin or that he was

present at and assisted in the commission of the Capital Felony," is not an aggravating circumstance within the meaning of Section 13-11-6 and should not be listed as such. That finding is closer akin to a finding of fact as per Section 13-11-4. The second sentence of the trial court's finding in paragraph (b) of the aggravating circumstances is inappropriate for the same reason. Likewise is the trial court's fourth aggravating circumstance (d) defective. That "the Capital Felony was committed while the Defendant was engaged in the commission of a double homicide in violation of Title (sic) 13-11-10," is not an aggravating circumstance withinD Section 13-11-6. Section 13-11-10 is not contained in the Code. Also, the first part of the trial court's eighth

aggravating circumstance (h), "that Phillip Wayne Tomlin killed or participated in the double murder of Cheryl Moore, a teenager of fifteen years of age, and Richard Brune, a teenager of nineteen years of age, at the Interstate 10 Highway Exit Ramp at Theodore-Dawes, Mobile County, Alabama," is not an aggravating circumstance.

The above "aggravating circumstances" are not contained in the Section 13-11-6 language and should not have been included as such in the trial court's sentencing order as aggravating circumstances.

[25] That the capital felony was especially heinous, atrocious, or cruel is an aggravating circumstance under Section 13-11-6(8); however, the trial court is required to set out the basis of

such a finding. See: Colley, supra; Hubbard v. State, 382 So. 2d 577 (Ala. Cr. App. 1979); Johnson v. State, 399 So. 2d 859 (Ala. Cr. App. 1979); Alford v. State, 307 So. 2d 433, (Fla. 1975); State vs. Dixon, 283 So. 2d 1 (Fla. 1973).

[26] To negate one of the mitigating circumstances, the trial court must determine whether appellant has a significant history of prior criminal activity within the meaning of Ex parte Cook, 369 So. 2d 1251, 1257 (Ala. 1978). It is not sufficient that appellant had a "history of prior criminal activity" to negate the mitigating circumstance of Section 13-11-7(1). Appropriate facts which substantiate this finding should be listed.

Though not raised by the appellant, we note that the trial court's order does not contain a statement of the "findings of fact from the trial" as required by Section 13-11-4. The pertinent portion of Section 13-11-4, Code of Ala. 1975, reads as follows:

"...If the court imposes a sentence of death, it shall set forth in writing, as the basis for the sentence of death, findings of fact from the trial and the sentence hearing, which shall at least include the following:

"(1) One or more of the aggravating circumstances enumerated in section 13-11-6, which it finds exists in the case and which it finds sufficient to support the sentence of death: and

"(2) Any of the mitigating circumstances enumerated in Section 13-11-7 which it finds insufficient to outweigh the aggravating circumstances."

See Johnson, supra for comprehensive findings of fact accompanied by aggravating and mitigating circumstances

the by trial court upon the conclusion of the sentence hearing.

We have carefully searched the record for any error prejudicial to the appellant. We have applied the "plain error rule." After due consideration to the record and to the alleged errors asserted on appeal, it is our opinion that the appellant received a fair trial.

However, due to the deficiencies in the sentencing order, this cause must be remanded with directions that the trial court's order be extended to include findings of fact from the trial and sentence hearing and for a correction of aggravating and mitigating circumstances as defined by the statute and that such be transmitted to this court in answer to the instant remand.

AFFIRMED IN PART; REMANDED WITH

DIRECTIONS.

TYSON and DeCARLO, JJ., concur.

HARRIS, P.J., and BOWNE, J., concur in result only.

BOWEN, Judge, concurring in result.

I disagree with the holding of the majority in Part IV of its opinion.

I concur only in the result reached by the majority because, in my opinion, the plain error rule of ARAP, Rule 45A, does apply to instructions which the trial judge failed to mention to the jury. Omissions from the charge may constitute error just as may misstatements or incorrect charges. The absence of certain instructions, by their very absence, will be just as "plainly visible" as an incorrect charge.

The majority states that the plain error rule is inapplicable but then finds

that the omission does not prejudice the defendant. In effect, they apply the plain error rule while denying its applicability. I would merely apply the rule.

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CERTIFICATE OF SERVICE

I, Richard D. Horne, a member of the bar of the U.S. Supreme Court and Attorney for the Petitioner, do hereby certify, pursuant to order of the Clerk of the U.S. Supreme Court that I have on the 4th day of April, 1984 served the requisite number of copies of the foregoing to the Clerk of the Supreme Court and the Attorney General for the State of Alabama, Charles Graddick, by placing a copy of same in the United States Mail, properly addressed and first class postage prepaid.

RICHARD D. HORNE

SWORN TO AND SUBSCRIBED BEFORE ME ON THIS THE 4th DAY OF APRIL, 1984.

NO. 83-1533

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1983

PHILLIP WAYNE TOMLIN,

PETITIONER

VS.

STATE OF ALABAMA,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF AND ARGUMENT IN OPPOSITION TO THE WRIT

OF

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ATTORNEYS FOR RESPONDENT

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ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

1. Is a cause final for purposes of 28 U.S.C. 1257, where the proceedings in the state appellate courts are not yet complete?

2. Where a party is in nowise affected by a constitutional defect in a statute, is such a party denied due process by his receiving no benefit from the invalidation of the defect in the statute?

3. Where a party is convicted under a statute which unconstitutionally bars the jury from considering lesser included offenses, does such a party have the right to a new trial where (A) the evidence at trial affirmatively excluded lesser included offenses, (B) the party at trial neither offered nor presented any evidence of lesser included offenses,

(C) although invited by the trial judge at the sentencing hearing to present ".. anything he wishes to introduce in his behalf...", the party suggests no claim relating to lesser included offenses, (D) the party did not complain of the preclusion of lesser included offenses at trial nor on appeal until long after the cause was under review by the State Supreme Court, and (E) the party never suggests any specific, practical way that such preclusion affected his case?

THE PARTIES

The parties, in the Circuit Court of Mobile County, Alabama, the Court of Criminal Appeals and Supreme Court of Alabama, were and are Phillip Wayne Tomlin, who is Petitioner herein, and the State of Alabama, who is Respondent herein.

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TABLE OF STATUTES

OPINIONS BELOW

The decisions and opinions of the Alabama appellate courts will not be reported until the state appellate litigation is complete, at which time they will be reported as follows:

Tomlin v. State, ____ So. 2d ____ (Cr. App. Ala., Nov. 20, 1979);

The same is submitted as Appendix "A" to this brief

Ex parte: Tomlin, ____ So. 2d ____ (S. Ct. Ala., Aug. 28, 1981);

The same is submitted as Appendix "B" to this brief.

Ex parte: Tomlin, ____ So. 2d ____ (S. Ct. Ala., Dec. 9, 1983);

The same is submitted as Appendix "C" to this brief.

JURISDICTION

The Petitioner has invoked this Honorable Court's jurisdiction under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner is advancing an alleged claim under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

The Petitioner was convicted and sentenced under Section 13-11-2, Code of Alabama, 1975.

STATEMENT OF THE CASE

The Petitioner, Phillip Wayne Tomlin, was indicted by the Grand Jury of Mobile County, Alabama, for capital murder[1]; his plea was not guilty. (R. pp. 1 and 2)

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[1]Title 13, Section 13-11-2(a)(7) and (10), Code of Alabama, 1975.

On the trial of the case, the State's evidence showed without conflict that the Petitioner planned the killing of one Richard Brune for some nine (9) months, traveled from Houston, Texas to Mobile, Alabama, with a "hit man" to carry out the killing and shot and killed Richard Brune and Brune's date, Cheryl Moore, in cold blood. The Defense was alibi; the Petitioner presented evidence that he was in Houston, Texas, on the date and at the time of the killings. At no time before, during or after the trial, which resulted in the conviction and sentence of death, did the Petitioner ever claim or even suggest that his case was in anywise affected by the Preclusion Clause which barred the jury from considering lesser included offenses. (Trial Record as a whole)

At the sentencing hearing, the Learned Trial Judge went to considerable lengths to advise the Petitioner that the Court would hear whatever evidence the Petitioner wished to present in response to the State's evidence of aggravation or in possible mitigation of sentence. (R.P. 1003-1006) Typical is the following passage.

> "Mr. Atchison [Defense Counsel]: Of course, Your Honor, the people out in Texas and the ones living out there are not subject to our subpoena."
>
> "THE COURT: I understand that, but I've tried four of these cases and in one of them they had witnesses all the way from Chicago. The only thing I want everyone to know and to show for the record is if the Defendant wishes to have any of these people here before there's any final judgment in this case I will allow him that opportunity.

In other words, we're not sticking to any strict legal rules or what have you. Anything he wishes to introduce in his behalf the Court will listen to. Okay?" (R.P. 1005; emphasis supplied.)

However, the Petitioner neither offered nor presented any evidence relating to lesser included offenses nor did he raise any claim nor make any complaint relating to the Preclusion Clause at or after the sentencing hearing. (R.pp. 1006-1052)

Appeal was taken to the Court of Criminal Appeals of Alabama. On November 20, 1979, that Court affirmed the conviction but found the Trial Court's sentencing order defective in several respects. As to the sentencing order, the Court of Criminal Appeals wrote:

> "...[D]ue to the deficiencies in the sentencing order, this cause must be remanded with directions that the trial court's order be extended to include findings of fact from the trial and sentence hearing and for a correction of aggravating and mitigating circumstances as defined by the statute and that such be transmitted to this court in answer to the instant remand.
>
> "AFFIRMED IN PART; REMANDED WITH DIRECTIONS." (Tomlin v. State, ____ So. 2d ____, ____ [Cr. App. Ala., Nov. 20, 1979]; Appendix "A", page 44).

The Respondent State has never taken issue with the order of remandment. However, the order was stayed automatically when the Petitioner sought review in the Alabama Supreme Court and is yet stayed pending the instant proceedings. The order of remandment is still outstanding, and, therefore, the litigation in the Court of Criminal Appeals is not yet complete. Although numerous issues

were raised in the Petitioner's appeal, no suggestion was made on original submission or rehearing that the Preclusion Clause in anywise affected the case. Tomlin v. State, ____ So. 2d ____ (Cr. App. Ala., Nov. 20, 1979); Appendix "A".

A petition for a writ of certiorari was filed in the Supreme Court of Alabama and automatically granted. No mention of the Preclusion Clause was made in this petition nor its supportive brief. On June 20, 1980, before the Alabama Supreme Court reached any decision in the instant cause, this Honorable Court issued its decision in Beck v. Alabama, (447 U.S. 625, 65 L. Ed. 2d 392, 100 S. Ct. 2382 [1980]), holding that the Preclusion Clause denied due process in cases where the evidence would support a finding of

lesser included offenses. A little over a month later, on July 31, 1980, the Petitioner filed a motion to reverse his conviction under Beck v. Alabama, above. The key passages of this motion read as follows:

> "4. Petitioner asserts that because the statute under which he was tried is and was unconstitutional his conviction is likewise unconstitutional and due to be reversed and remanded.
>
> 5. Petitioner further asserts that any re-trial of his case may not be had under the present death penalty statute or any death penalty statute to be enacted as such trial would be in violation of the ex post facto clauses of Section 7, Article 1, Constitution of Alabama of 1901, and Article 1, Section 9, Constitution of the United States.
>
> "WHEREFORE, the premises considered, Petitioner respectfully moves that his conviction be reversed, that it be remanded to the Circuit

> Court of Mobile County, and that instruction be given said Court that Petitioner be tried for first degree murder and lesser included offenses and not under any statute for which the penalty is death or life without parole."

This was the first time the Petitioner ever mentioned the Preclusion Clause in this litigation and the first time he ever presented any claim relating to it, but he still made no suggestion that he or his case had been actually prejudiced by the Preclusion Clause.

Subsequently, the Alabama Supreme Court severed the Preclusion Clause from the statute and reformed the sentencing procedures under the statute, which had also been criticized in Beck v. Alabama, above. Beck v. State, 396 So. 2d 645 (S. Ct. Ala., 1980) In addition, following Evans v. Britton, (628 F. 2d 400 [5th Cir., 1980] and 639 F. 2d 221 [5th Cir.,

1980])[2], the Supreme Court of Alabama ruled that all cases tried under the statute prior to Beck v. Alabama, above, (except those involving plea bargains[3]) had to be retried. Ritter v. State, 403 So. 2d 154 (S. Ct. Ala., 1981)[4]

On August 28, 1981, the Alabama Supreme court reversed and remanded the Petitioner's conviction on authority of Ritter v. State, (403 So. 2d 154 [S. Ct. Ala., 1981]). Ex parte: Tomlin, ____ So. 2d ____ (S. Ct. Ala., Aug. 28, 1981); Appendix "B".

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[2]Reversed, sub. nom. Hopper v. Evans, 456 U.S. 605, 72 L. Ed. 2d 367, 102 S. Ct. 2049 (1982)

[3]See Lane v. State, 412 So. 2d 292 (S. Ct. Ala., 1982); Graham v. State, 403 So. 2d 275 (Cr. App. Ala., 1980); cert. quash. 403 So. 2d 286

[4]Vacated sub. nom. Alabama v. Ritter, 457 U.S. 1114, 73 L. Ed. 2d 1326, 102 S. Ct. 2921 (1982); overruled Ritter v. State, 429 So. 2d 928 (S. Ct. Ala., 1983)

Fearing that the Alabama Supreme Court's interpretation might put the statute once again beyond the constitutional pale by authorizing arbitrary verdicts of guilt of lesser included offenses, even where there was no evidence to support them,[5] the State of Alabama applied for rehearing. The State's argument on rehearing was the same it made in response to the Petitioner's July 31, 1980, motion, to wit:

1. The State's evidence proved the charged capital offense to the exclusion of all lesser included offenses.

2. The Defense evidence of an alleged alibi, while a complete defense to the charge if believed by the jury,

---

[5]See Roberts v. Louisiana, 428 U.S. 325, 49 L. Ed. 2d 974, 96 S. Ct. 3001 (1976)

could not reduce the degree of the crime.

3. The Petitioner has never claimed that the Preclusion Clause had any impact on his case.

4. If the Petitioner can suggest any specific, practical way the Preclusion Clause affected his case, he should be heard, but, if he makes no such suggestion, a re-trial is unnecessary and a re-trial to have a new jury consider unsupported lesser included offenses is constitutionally impermissible.

Although he filed several additional briefs in the Alabama Supreme Court, the Petitioner never suggested any specific practical way that the Preclusion Clause affected his case. His claims of prejudice were consistently the sort of general, theoretical and philosophical arguments he makes here.

While the instant case pended on rehearing, this Honorable Court reversed Evans v. Britton (above) and ruled that an Alabama capital convict, who was convicted prior to Beck v. Alabama (above) and who was not prejudiced by the Preclusion Clause, had no right to a new trial. Hopper v. Evans, 456 U.S. 605, 72 L. Ed. 2d 367, 102 S. Ct. 2049 (1982) See also Alabama v. Evans, ____ U.S. ____, 75 L. Ed. 2d 921, 103 S. Ct. ____ (1983).

On December 9, 1983, the Alabama Supreme Court granted the State's application for rehearing in this cause. The Court ruled that the Petitioner was not entitled to a new trial, since there was no evidence that would support a finding of lesser included offenses and he had suggested no plausible claim, not contradicted by his own testimony, which entitled him to have the jury consider

lesser included offenses. Ex parte: Tomlin, ____ So. 2d ____ (S. Ct. Ala., Dec. 9, 1983); Appendix "C". The Alabama Supreme Court declined to decide one of the Petitioner's claims, because it related to sentencing and the Court of Criminal Appeals decision was not final with regard thereto. See Appendix "C", pages 64-65.

STATEMENT OF THE FACTS

I.

SUMMARY OF THE FACTS

The State's evidence at trial showed that on November 25, 1975, Richard Brune accidently killed David Tomlin, the Petitioner's younger brother, in Mobile, Alabama. The Petitioner's family was unable to accept David's death as an accident and became obsessed with the idea of having Bruns prosecuted. On

March 19, 1976, in Houston, Texas, the Petitioner stated his intention of traveling to Mobile, Alabama, for the purpose of killing the person who had shot his brother.

On January 1,1977, the Petitioner arrived in Mobile, Alabama from Houston, Texas, with one Ron Daniels, whom the Petitioner introduced to acquaintances as a "hit man." The Petitioner stated that they had come to Mobile to kill Richard Brune. The next day, the Petitioner and Daniels shot and killed Richard Brune and Brune's date, Cheryl Moore, in cold blood.

The Defense was alibi. The Petitioner testified that he was in Houston, Texas, on January 1-2, 1977.

II.

THE FACTS DETAILED

A.
THE STATE'S CASE

The State's evidence tended to prove the following facts, set out here in chronological order.

On May 30, 1975, the Houston, Texas, Police Department returned to the Petitioner two fire arms which they had seized from his automobile incident to an arrest. The weapons were a 38 cal. Smith and Wesson revolver and a 16 gauge shotgun. (R. pp. 585-586 and 750)

On November 25, 1975, David Tomlin, the Petitioner's younger brother, was shot at his home in Prichard, Alabama, and died. The death was the result of David and his friend, Richard Brune, playfully tussling in a room where a loaded shotgun was leaning against the

wall. When the gun began to fall both boys tried to catch it, Richard by the stock, David by the barrel. In the process, the gun discharged, killing David Tomlin. (R. pp. 461-465)

Initial reaction to the incident was that it was a tragic accident, a position supported by the investigation of the Prichard Police Department. Richard Brune was asked to serve and did serve as a pallbearer for David Tomlin. (R. pp. 231-232 and 464).

However, in the months that followed, Jack Tomlin, father of both David and the Petitioner, apparently became obsessed with a desire to see Richard Brune prosecuted. (R. pp. 464-467)

About four months later, on March 19, 1976, Officer David Hammons of the Texas Department of Public Safety,

operating undercover, entered the Wet and Wild Club, a Houston, Texas, night club, in an effort to purchase drugs from the Petitioner. Covering Officer Hammons was his partner, Officer Eddie Hebison. The officers made no overt contact in the lounge, but Officer Hebison sat with his back to Officer Hammons, so that he could hear most of what was being said. (R. pp. 700-701 and 783-784)

Officer Hammons had arranged to buy some drugs from the Petitioner and tried to arrange a larger purchase of drugs. The Petitioner declined the business saying that he had to go back to Alabama and kill someone, because he had learned that his brother's death was no accident. (R. pp. 701-702 and 7784-785)

Because such talk in the context of drug dealing in nude go-go lounges is so

common and usually empty, the Texas officers paid little attention to it, other than making a note of it. (R. pp. 702-704 and 785-786)

Nine months later, on January 1, 1977, near midnight, the Petitioner and one Ron Daniels[6] arrived at the mobile home in Theodore, Alabama, occupied by the Petitioner's brothers-in-law, Randy and Danny Shanks. The Petitioner told the Shanks that his father, Jack Tomlin, had picked them up in New Orleans, where they had flown from Houston, Texas. The Petitioner told his brothers-in-law that he had come to Mobile to kill Richard Brune and introduced his companion, Ron Daniels, as a "hit man" from Houston. The Petitioner attempted to borrow Danny

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[6]See Alabama v. Daniels, 457 U.S. 1114, 73 L. Ed. 2d 1325, 102 S. Ct. 2920 (1983)

Shank's automobile to use as a get-away car. Danny declined. At the Petitioner's request, the Messers Shanks rented a motel room for the Petitioner and Daniels. In the motel room the Petitioner and Daniels showed the brothers a 38 cal. pistol, a 44 cal. pistol and a 16 gauge shotgun, which they had brought from Houston. (R. pp. 365-384, 414 and 511-515)

The next day, January 2, 1977, about noon, the Petitioner was at the Highway 90 Lounge near Mobile, Alabama. He was driving a light-colored 1968 Ford, which belonged to his sister, Brenda Tomlin Watson. Ron Daniels was with him. The Petitioner talked with both of his brothers-in-law and Herman Stokes. When the Petitioner took Danny Shanks home, the latter observed that the left front tire was low. (R. pp. 325-330, 373-375 and 516-518)

About five hours later, Ricky Harold Pearson noticed a light-colored 1968 Ford, with its motor running and blinker lights burning on the side of a ramp on Interstate 10 in Western Mobile County. There was no one in the car, but the car was pointed west toward Mississippi and Louisiana. Although it was only about five o'clock in the evening it was already dark owing to the weather. Rain and sleet had been falling. (R. pp. 207-209)

A short time later, about five-thirty p.m., Mr. Charles R. Castro and his wife passed the same place. By that time the Ford was gone; in its place was a 1970 Pontiac. The passenger side door was open and someone appeared to be lying beside the car. The Castros reported their discovery to Mr. Harold Davis, a deputy sheriff. Mr. Davis

investigated and found the bodies of Richard Brune, age 19, and Cheryl Moore, age 15. They were dead. (R. pp. 218-220, 223-227, 229-230, and 231-236)

An investigation at the scene showed that the two young people still had their money on their persons. (R. p. 658)

Richard Brune and Cheryl Moore died of numerous wounds inflicted by a .38 cal. pistol, which was probably a Smith and Wesson, and a 16 gauge shotgun. The evidence indicated that the shots were fired from the rear seat. (R. pp. 262-335)

On January 29, 1977, the New Orleans, Louisiana, Police Department located the Petitioner's sister's 1968 Ford in the parking lot of New Orleans International Airport. It had never been reported stolen. (R. pp. 436-443 and 614)

An examination of this vehicle revealed that it had a low left front tire. Although the car was dirty and in disorder, there were no fingerprints inside it. This was unusual and coupled with the presence of a towel in the front seat suggested that the car had been wiped clean. Inside the automobile was found a ticket from an automatic dispenser at the airport parking lot. According to this ticket the 1968 Ford had entered the parking lot on January 2, 1977, at 8:08 p.m. The driving time from the murder scene to New Orleans International Airport is between two and a half to three hours. (R. pp. 443, 446-456, 493-498 and 612-613)

If the car entered the airport parking lot at 8:08 p.m., its occupants were in plenty of time to catch Eastern

Airline's flight 569 from New Orleans to Houston. Its departure time was 8:40 p.m. However, on January 2, 1977, probably because of the bad weather, the flight did not depart until 9:40 p.m. (R. pp. 251-252, 589-591 and 631)

At the time of his arrest in Houston, Ron Daniels had a suitcase attached to which was a baggage check. The baggage check indicated that the suitcase had been checked on Eastern Airline's flight 569, New Orleans to Houston on January 2, 1977. Inside the suitcase were four 16 gauge shotgun shells. (R. pp. 250-252 and 483-487)

At the time of their arrests, both Daniels and the Appellant denied being in Mobile on January 1-2, 1977. (R. pp. 488 and 690)

B.

THE DEFENSE EVIDENCE

The defense was alibi. The Appellant denied that he left the area of Houston, Texas, on January 1-2, 1977. (R. pp. 913-965)

SUMMARY OF THE ARGUMENT

1. Since additional proceedings in the state appellate courts are contemplated, this cause is not final within the meaning of 28 U.S.C. 1257. Odell v. Espinoza, 456 U.S. 430, 72 L. Ed. 2d 237, 102 S. Ct. 1865 (1982). This is especially so since the Petitioner's claims are based on matters relating to sentencing, which may be mooted by the time the state appellate court proceedings are complete.

2. This Petitioner is not the victim of an ex post facto law as the same has been understood for some 200 years. Calder v. Bull, 3 Dal. 386, 3 U.S. 386, 1 L. Ed. 2d 648 (1798) The Petitioner cannot take retroactive advantage of the Beck reformation, because his rights were not abridged by the Preclusion Clause, and he therefore, has no standing to complain about it. McGowan v. Maryland, 366 U.S. 420, 429, 6 L.Ed.2d 393, 401, 81 S. Ct. 1101 (1961); New York v. Ferber, 458 U.S. 747, 73 L.Ed.2d 1113,1129,102 S. Ct. 3348 (1982) The Petitioner's claim of prejudice is that but for the Preclusion Clause, he might have tried the case differently. This is the exact sort of claim of prejudice which this Honorable Court rejected in Hopper v. Evans, (456 U.S. 605, 72 L. Ed. 2d 367, 102 S. Ct.

2049 [1982]) There is no way the evidence in this case could support a conviction for a lesser included offense. The Petitioner has had many opportunities to suggest evidence which he might have of lesser included offenses and to suggest how the Preclusion Clause affected his case. He has made no such suggestions. He simply was not prejudiced by the Preclusion Clause.

3. The Respondent State has consistently insisted that this case is legally indistinguishable from Hopper v. Evans, above. There is no evidence of intoxication or mitigating grief in this record, and the Petitioner has suggested none outside the record. Trial tactics, which would present to the jury lesser included offenses which are not supported by the evidence, are constitutionally

forbidden. Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S. Ct. 2726 (1972); Roberts v. Louisiana, 428 U.S. 325, 49 L.Ed.2d 974, 96 S.Ct. 3001 (1976) Hopper v. Evans, 456 U.S. 605, 611, 72 L.Ed.2d 367, 373, 102 S.Ct. 2049 (1982)

ARGUMENT

I.

SINCE THE LITIGATION IN THE STATE APPELLATE COURTS IS NOT YET COMPLETE, THIS CAUSE IS NOT YET FINAL WITHIN THE MEANING OF 28 U.S.C. 1257

At first glance it might appear that this case is similar to cases like Brady v. Maryland, (373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 [1963]) and Abood v. Detroit Board of Education, (431 U.S. 209, 52 L. Ed. 2d 261, 97 S. Ct. 1782 [1977]) for purposes of 28 U.S.C. 1257 finality. However, there are two fundamental distinctions between those and this case. First, the matters at issue in the remandments of those cases were not

fundamental to the claims raised in this Court on certiorari. Second, the remandments in those cases were each a part of an order finally disposing of an appeal.

The Petitioner's claims are based to a great degree on sentencing matters. For example, the Petitioner cites Beck v. State (396 So.2d 645 [S. Ct. Ala., 1980]) and Godfrey v. Georgia (446 U.S. 420, 64 L. Ed. 2d 398, 100 S. Ct. 1759 [1980]), apparently for the proposition that he had the constitutional right to have the jury consider the aggravating and mitigating circumstances.[7] (Petition, page 29) Again and again the petition

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[7]Neither Godfrey nor Beck stands for such a proposition. Godfrey concerned the standards which must guide the jury, if they are the sentencing authority. Beck addressed neither federal nor state constitutional issues but legislative intent. The Alabama Supreme Court wrote:

emphasizes the "...sentencing of the defendant [Petitioner] to die by electrocution..." (Petition, page 17. See also pages 8, 22 and 28) The extent

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Footnote 7 continued:

> "...Because the legislature has provided for jury participation in the sentencing scheme, before this jury participation can comport with constitutional requirements, certain procedures must be followed by the trial court...
>
> "The Attorney General recognizes this and wants the jury verdict requirement severed. To sever the jury verdict requirement, in our opinion, would not carry out legislative intent; however, since we conclude that the dominant intent of the legislature was to pass a constitutional death penalty law, we may now construe the requirement that the jury fix the penalty at death to be permissive instead of mandatory. By doing this we carry out legislative intent to pass a constitutional death penalty statute..." (396 So.2d 645; 660; emphasis supplied)

to which the Petitioner relies on jury sentencing and the death penalty is one of several things which is unclear about this petition, but it is clear that he does rely on them. On remandment the Trial Judge might set aside the death penalty. In that event this petition, to the extent that jury sentencing and the death penalty form bases for it, would be mooted.

More significantly, the wording of the order of the Court of Criminal Appeals[8] clearly demonstrates that additional proceedings in this cause are contemplated by that Court. The Petitioner brings this action to review a decision by the Alabama Supreme Court. Yet, the Alabama Supreme Court expressly

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8"...[A]nd that such [corrected and extended sentencing order] be transmitted to this court in answer to the instant remand...." (Appendix "A", page 44)

declined to review sentencing matters until "...after remandment..." (Appendix "C", page 65). Obviously, if the state appellate court proceedings are still under way, this cause is in no sense final. See Odell v. Espinoza, 456 U.S. 430, 72 L. Ed. 2d 237, 102 S. Ct. 1865 (1982). There is simply no way that meaningful review can be undertaken by this Honorable Court, when the very foundations of the Petitioner's claims are in a state of flux. For this reason, if no other, the petition should be denied at this time.

II.

ON THE MERITS

The Petitioner's arguments strike out in so many different directions that it is impossible to present a concise response to them. Therefore, the Respondent State can only address them claim by claim.

A.

ON THE PETITIONER'S FIRST SET OF CLAIMS

The Petitioner somehow works himself around to a claim that he is the victim of an ex post facto law. Frankly, this writer is at a loss to understand this argument. For nearly 200 years the definition of ex post facto law found in Calder v. Ball, (3 Dal. 386, 390, 3 U.S. 386, 390, 1 L. Ed. 2d 648, 650 [1798]) has been accepted, and under that definition this case does not involve an ex post facto law. The Alabama Supreme Court's action in Beck v. State, (396 So. 2d 645 [S.Ct. Ala., 1980]) had nothing whatsoever to do with altering the definition of the crime, aggravating it, changing the punishment nor the evidence required for conviction. The

Petitioner's real complaint is not that he was disadvantaged retroactively but that he was not allowed to take retroactive advantage of the Beck reformation. However this was simply the result of the rule which denies any advantage to those who are not prejudiced by a constitutional defect. McGowan v. Maryland, 366 U.S. 420, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1961)[9] Before, a person can even complain about a constitutional defect in a statute he must show a violation of his rights. New York v. Ferber, 458 U.S. 747, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982)[10]; County

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9"...[T]he general rule is that a 'litigant may only assert his own constitutional rights or immunities...." (366 U.S. 420, 429, 6 L. Ed. 2d 393, 401)

10"...The traditional rule is that person to whom a statute may constitutionally be applied may not challenge that statute on

Court v. Allen, 442 U.S. 140, 60 L. Ed. 2d 777, 99 S. Ct. 2213 (1979).[11]

The Petitioner claims he was prejudiced by the Preclusion Clause. For nearly four years the State of Alabama has been asking the Petitioner: How were you prejudiced? The answer is always the same as that presented in this petition: But for the Preclusion Clause the

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Footnote 10 continued:

the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court...." (73 L. Ed. 2d 1113, 1129)

11"...A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights. As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations. Broadrick v. Oklahoma, 413 US 601, 610, 37 L Ed 2d 830, 93 S Ct 2908 (and cases cited)...." (442 U.S. 140, 154-155, 60 L. Ed. 2d 777, 790)

Petitioner might have acted differently at trial. If the Petitioner had ever stated what he would have done differently, the case might have been re-tried a long time ago.

The Petitioner claims that he could not have foreseen the Beck decisions. Other capital defendants, who were no more clairvoyant than this Petitioner, did present evidence of lesser included offenses. See, for example, Beck v. Alabama, 447 Ala. 625, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980). Yet, this Petitioner, even at his sentencing hearing and after the Trial Judge expressly advised him "...We're not sticking to any strict legal rules...[a]nything he wishes to introduce...the Court will listen to..." (R.p. 1005), did not make any reference to lesser included offenses.

The point here is not so much that the Petitioner submitted no evidence of lesser included offenses at his pre-Beck trial but that after Beck he was invited, even urged, to advise the courts of any way he was prejudiced by the Preclusion Clause, and his response was and is: If it had not been for the Preclusion Clause, I might have tried the case differently. Even after Beck, the Petitioner's initial reaction was simply a cynical claim that the invalidated Preclusion Clause voided the whole statute and protected him forever from prosecution for the capital crime of which his guilt is obvious.

The Petitioner's claim that Reed v. State (407 So.2d 162 [S. Ct. Ala., 1981]) inhibited him from introducing evidence of lesser included offenses is, to put it bluntly, nonsense. The Petitioner was

tried on March 20-25, 1979; Reed was handed down June 12, 1981, some two years later! Reed was based on a misapprehension of federal constitutional law (See Ritter v. State, 414 So.2d 452 [S. Ct. Ala., 1982]), which was disapproved by implication in Hopper v. Evans (456 U.S. 605, 72 L. Ed. 2d 367, 102 S. Ct. 2049 [1982]) and superseded Ritter v. State (429 So.2d 928 [S. Ct. Ala., 1983])

The fact of the matter is that, had there never been a Preclusion Clause, the Petitioner would have tried the case just the way he did. If the case were re-tried now, the new trial would be a carbon copy of the first trial, except that the Petitioner would no doubt ask for charges to the jury on lesser included offenses, this Honorable Court's

teachings on the subject[12] to the contrary notwithstanding.

There is simply no way that a long and carefully planned and precisely executed murder of two people can be anything but the capital crime charged in the indictment. If there were a scintilla of evidence of intoxication, passion, insanity or anything else which would reduce the degree of the crime, the Petitioner has had many, many opportunities to present it or, at least suggest its existence to the Courts both before and after the Beck decisions. He has made no effort to do so. It must be concluded, therefore, that such evidence

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12 See Furman v. Georgia, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972); Roberts v. Louisiana, 428 U.S. 325, 49 L. Ed. 2d 974, 96 S. Ct. 3001 (1976) Hopper v. Evans, 456 U.S. 605, 611, 72 L.Ed.2d 367, 373, 102 S.Ct. 1049 (1982)

simply does not exist and never did. Instead, the Petitioner presented an alibi that he was in Houston, Texas at the time of the Mobile, Alabama, killings. If the jury accepted this alibi, they would have had to return a verdict of not guilty. However, no alibi could alter the nature of the killings, whoever did them.

The Petitioner's claims of prejudice are identical to those rejected by this Honorable Court in Hopper v. Evans, (456 U.S. 605, 72 L. Ed. 2d 367, 102 S. Ct. 2049 [1982]). To paraphrase Hopper: The preclusion clause did not prejudice the Petitioner in any way, and a new trial is not warranted. (456 U.S. 605, 613-614, 72 L. Ed. 2d 367, 374-375)

B.

ON THE PETITIONER'S SECOND SET OF CLAIMS

Contrary to what is stated in the petition (page 23), the Respondent State has never conceded or even suggested that this case is distinguishable from Hopper v. Evans (456 U.S. 605, 72 L. Ed. 2d 367, 102 S. Ct. 2049 [1982]). The Respondent State's consistent argument has been that the legal effect of a guilty plea and that of a pure alibi defense are, for the purposes of the Preclusion Clause, identical.

The Petitioner's claim that "...[t]he evidence of record in the case at bar does not conclusively or absolutely negate the possibility that the Petitioner...never intended a double homocide...." (Petition, pages 24-25), indicates that Learned Counsel has

forgotten what the evidence was. The Respondent State, unlike the Petitioner, presents both a summary and a detailed statement of the facts. The evidence taken as a whole and particularly that which shows that the victims were each shot with a pistol and shotgun from the back seat of their car, clearly demonstrates a cold-blooded intentional double homocide. The evidence that the murder of Brune was being planned nine (9) months earlier, the employing of a "hit man", and the carefully planned and executed two-stage trips to and from Mobile all negate the possibility of the crime's being the product of mitigating passion, drunkenness, etc. Even if for some reason the "hit man" somehow managed to shoot both victims with a shotgun and a pistol, the Petitioner was present, and it was his particularized intent that

brought the "hit man" to Mobile in the first place.

The Petitioner claims that there was evidence that he, his deceased brother and the victim, Richard Brune, all abused drugs and alcohol. This statement is, to put it bluntly, false. There was evidence that the Petitioner sold drugs but no evidence that he used drugs or abused alcohol. The evidence, in fact, negates intoxication of any sort on the day of the killing. Not only is there no evidence of the deceased brother's or Brune's using drugs or alcohol but even if there were, it would not have altered the nature of the crime. It is as unlawful to murder a drunk or an addict as it is to murder a minister.

As for the Petitioner's alleged grief, presumably he was upset over his brother's death but this record is devoid

of any evidence of the sort of grief which would mitigate a double murder thirteen (13) months after the event.

The Petitioner does not and has never suggested the existence of any actual evidence of intoxication or passion. He claims that he wants to raise these by trial tactics. However, he has never revealed by what clever tactics he would raise such issues unsupported by the evidence. The only such tactic this writer can imagine would be to ask for charges to the jury on lesser included offenses notwithstanding the lack of evidence. However, allowing the jury to consider lesser included offenses not based on the evidence would violate the Constitution. Furman v. Georgia, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972); Roberts v. Louisiana, 428 U.S. 325, 49 L. Ed. 2d

974, 96 S. Ct. 3001 (1976) Hopper v. Evans, 456 U.S. 605, 611, 72 L.Ed.2d 367, 373, 102 S.Ct. 1049 (1982)

The Appellant has never suggested any way in which the Preclusion Clause prejudiced his case; he has never suggested any way the Preclusion Clause affected his rights. Therefore, he has no standing to complain about the Preclusion Clause.

CONCLUSION

In conclusion the State of Alabama, Respondent, respectfully submits that the decisions and opinions of the Alabama Courts are not final within the meaning of 28 U.S.C. 1257 and are, in any event, correct and entirely consistent with the decisions of this Honorable Court and that the writ is due to be denied and the Respondent prays such denial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph G. L. Marston III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, hereby certify that on this _____ day of _____, 1984, I did serve the requisite number of copies of the foregoing on the Attorneys for Phillip Wayne Tomlin, Petitioner, by mailing the same to them first-class postage prepaid and addressed as follows:

Hon. James E. Atchison
Hon. Richard D. Horne
Hon. William B. Jackson, II
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NO. 83-1533

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1983

PHILLIP WAYNE TOMLIN,

PETITIONER

VS.

STATE OF ALABAMA,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

APPENDICIES TO THE BRIEF AND ARGUMENT IN OPPOSITION TO THE WRIT

OF

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TABLE OF APPENDICIES

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APPENDIX "A"

NOV 20, 1979

THE STATE OF ALABAMA ---
JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1979-80

1 Div. 23

Phillip Wayne Tomlin

v.

State

Appeal from Mobile Circuit Court

BOOKOUT, JUDGE

Murder in the first degree wherein two or more human beings are intentionally killed, and murder in the first degree when the killing was done for a pecuniary or other valuable consideration or pursuant to a contract or for hire; sentence: death by electrocution.

The State's evidence was sufficient to justify appellant's conviction even though there was no eyewitness testimony concerning the double killings. It is therefore unnecessary for the purposes of this appeal to narrate a detailed account of the brutal and calculated murders contained in the voluminous record before us. Briefly, the facts are as follows:

At approximately 5:30 p.m. on January 2, 1977, at the Theodore-Dawes Exit to Interstate 10 in Mobile, nineteen-year-old Ricky Brune and fifteen-year-old Cheryl Moore were found dead in the front seat of Brune's car. Their deaths resulted from multiple gunshot wounds in the back from a sixteen-gauge shotgun and a .38 caliber pistol. The fatal shots were fired from inside the car from the rear seat. An

unoccupied 1968 Ford had been spotted parked at the exit with the motor running at 4:50 p.m.

The appellant and his "partner," John Ronald Daniels, had arrived in Mobile at Randy and Danny Shanks' trailer the night before between 11:30 and 12:00 p.m. after travelling from Houston, Texas. The Shanks were the appellant's brothers-in-law. The appellant introduced Daniels as his "hit man" and told the Shanks "he had come to Mobile to get revenge ... on the guy that killed his brother ... [that] he was going to kill the person who killed his brother." The appellant's brother had been killed as a result of an accidental shotgun discharge which involved Ricky Brune on November 25, 1975.

After midnight on January 2, Randy Shanks rented a room at the Night Days

Inn for appellant and Daniels. Inside the motel room the appellant and Daniels showed the Shanks the .38 and .44 caliber pistols and a disassembled sixteen-gauge shotgun. The weapons were kept in a satchel. Later, the appellant drove the Shanks back to their trailer and asked Danny if he could use his car "the next day to get out of town." Danny told him no, that he "didn't want to get involved in it." The appellant was driving his sister's 1968 Ford.

The appellant and his "hit man" Daniels were last seen in Mobile between 3:00 and 4:00 p.m. the afternoon of the murders at the Highway 90 Lounge located two miles north of the Theordore-Dawes Exit. Outside the lounge inside his sister's car, the appellant had conversations with the Shanks brothers

and James Stokes. The appellant was next seen in Houston, Texas, later that night. His sister's 1968 ford was found abandoned at the New Orleans International Airport.

I.

The appellant contends that Counts 1 and 3 of the indictment were defective and that his demurrer to those counts should have been granted. We do not agree. Omitting the formal parts, the indictment charges that the appellant, Phillip Wayne Tomlin:

> "... did unlawfully, intentionally, and with malice aforethought kill Richard Brune and Cheryl Moore by, to wit: on January 2, 1977, at a location on or near Interstate 10 in Mobile County, Alabama, was shot with a gun, in violation of Act Number 213, Section 2, Sub-Section J (Act #213, §2(j)), Acts of Alabama, Regular Session, 1975, against the peace and dignity of the State of Alabama.
>
> "... did unlawfully, intentionally, and with malice aforethought kill Richard Brune

and Cheryl Moore by shooting Richard Brune and Cheryl Moore with a gun, said killings were done for a pecuniary or other valuable consideration, or pursuant to a contract or for hire, in violation of Act Number 213, Section 2, Sub-Section G (Act #213, §2(g)), Acts of Alabama, Regular Session, 1975, against the peace and dignity of the State of Alabama.

"... did unlawfully, intentionally, and with malice aforethought kill Richard Brune and Cheryl Moore, by shooting them with a gun, wherein both Richard Brune and Cheryl Moore were intentionally killed by PHILLIP WAYNE TOMLIN by one or a series of acts, in violation of Act Number 213, Section 2, Sub-Section J (Act #213, §2(j)) and Act Number 213, Section 6, Sub-Section H (Act #213, §6 (h)), Acts of Alabama, Regular Session, 1975, in that said killings were especially heinous, atrocious or cruel...."

Appellant pled not guilty to the charges at his arraignment on October 13, 1977. He reserved the right to file special pleas within twenty days.

Appellant did not file his demurrer to the indictment until March 20, 1978, after the jury had been empaneled. We hold that appellant's indictment was not subject to demurrer, and in any event the delay in filing constituted a waiver.

Recently we affirmed long standing principles recognized by this court and the Alabama Supreme Court by holding the following:

> "Generally, a demurrer is the proper procedure to raise defects in an indictment. Andrews v. State, 344 So.2d 533 (Ala.Cr.App.), cert.denied, 344 So.2d 538 (Ala. 1977). Since a plea to the merits admits the validity of an indictment, a demurrer filed after arraignment and after a plea of not guilty is properly stricken. Underwood v. State, 248 Ala. 308, 27 So.2d 492 (1946). The right to file a demurrer is waived unless the demurrer is filed before a plea to the merits. Holloway v. State, 37 Ala.App. 96, 64 So.2d 115, cert. denied, 258 Ala. 558, 64 So.2d 121 (1953). If an indictment is merely voidable

and subject to demurrer, the failure to demur will prevent appellate review of the indictment's short comings. Williams v. State, 333 So.2d 610 (Ala.Cr.App.), affirmed, 333 So.2d 613 (Ala. 1976)." Tommy Edwards v. State, ___ So.2d ___ (Ala.Cr.App. 1979).

Of course if an indictment is void as opposed to voidable, as where the indictment does not on its face charge an offense, or where the accused is left unware of the nature and cause of the charge against him, this court is bound to take notice of such defect even in the absence of an objection. Edwards, supra; Davidson v. State, 351 So.2d 683 (Ala. Cr.App. 1977); Fitzgerald v. State, 53 Ala.App. 663, 303 So.2d 162 (1974). If the indictment had been void rather than voidable, the defect would have been reached by the appellant's request for an affirmative charge. Edwards, supra;

Coker v. State, 18 Ala.App. 550, 93 So. 384 (1922). The defect could have been preserved by a motion in arrest of judgment. Francois v. State, 20 Ala. 83 (1852).

In the instant case, however, each count of the indictment stated an offense in such a manner as to apprise appellant of the nature of the charges against him. We hold, therefore, that the indictment was not void on its face and that the trial court was correct in overruling the untimely demurrer.

Even had the demurrer been timely filed, we hold that the faulty grammar in Count 1 was not objectionable.

> "Before an objection because of false grammar, incorrect spelling, or mere clerical errors is entertained, the court should be satisfied of the tendency of the error to mislead, or to leave in doubt the meaning of the charge to a person of common understanding,

> reading, not for the purpose of finding defects, but to ascertain what is intended to be charged. Grant v. State, 55 Ala. 201 (1876). Neither clerical nor grammatical errors vitiate an indictment unless they change the words or obscure the meaning, Grant, supra, or unless the error changes a word into one of different import or the sense is so obscure that one of ordinary intelligence cannot determine with certainty the meaning from the context. Sanders v. State, 2 Ala. App. 13, 56 So. 69 (1911)...." Cook v. State, 369 So. 2d 1243 (Ala. Cr. App. 1977), affirmed in part, reversed in part on other grounds, 369 So. 2d 1251 (Ala. 1978).

The sense of Count 1 in the indictment is clear. The grammatical error did not obscure the sense of what was intended to be charged.

Contrary to appellant's argument that Count 1 of the indictment charges no more than the first degree murder of two persons, we hold that the requisite language of § 13-11-2(a)(10), Code of

Ala. 1975, is sufficiently followed to charge a capital offense. The Alabama Supreme Court has specifically held that the capital offense expressed in § 13-11-2(a)(10) is murder aggravated by two or more individuals being killed. Ex parte Clements, 370 So. 2d 723, 726 (Ala. 1979). It is thus distinguishable from traditional noncapital first degree murder.

It was proper that each count allege that the killings were done "unlawfully, intentionally, and with malice aforethought," elements of the first degree murder statute, rather than solely done intentionally. Section 13-11-2(a)(10) requires proof of (1) murder in the first degree (2) wherein two or more people are intentionally killed by the defendant. Thus first degree murder and

an intentional killing must be alleged and proved under the instant statute.

Count 3 of the indictment was likewise not subject to demurrer for concluding that "said killings were especially heinous, atrocious or cruel" - language found in § 13-11-6(8). That language was mere surplusage to the first part of Count 3 which properly charged a capital offense under § 13-11-2(a)(10). As early cases have held, unnecessary averments in an indictment do not impair its validity. The most that can result from them is to hold the prosecution to the proof of them. Aaron v. State, 39 Ala. 75 (1863). Johnson v. State, 35 Ala. 363 (1860); Lindsay v. State, 19 Ala. 560 (1851). Surplusage does not vitiate an indictment otherwise good. McDaniel v. State, 20 Ala.App. 407, 102

So. 788, cert. denied, 212 Ala. 415, 102 So. 791 (1924). As long as the remaining portions of an indictment validly charge a crime, the existence of surplusage will not affect the validity of a conviction. United States v. Hyde, 448 F.2d 815 (5th Cir.), cert. denied, 404 U.S. 1058, 92 S.Ct. 736, 30 L.Ed.2d 745 (1971).

II.

Appellant contends that the trial court erred in failing to exclude the State's evidence relating to Count 2 of the indictment. Appellant correctly maintains that the State presented no evidence that the appellant himself committed the killings for pecuniary gain or pursuant to a contract or for hire. It is thus argued that appellant's motion to exclude the State's evidence for failure to prove a prima facie case under

Count 2 of the indictment should have been granted.

In addition, the trial court at the sentence hearing specifically found that the killings were not committed for pecuniary gain and also that the appellant was not an accomplice, but was an actual participant in the murders. It is argued that the trial court's determination after the sentence hearing that the killings were not committed for pecuniary gain is in direct conflict with his denial to exclude the State's evidence as to Count 2 of the indictment at the trial. The above two contentions, while logical and persuasive, must fail. We shall address appellant's arguments separately.

A.

The evidence clearly demonstrated that John Ronald Daniels, appellant's

"partner", was a "hit man." Appellant had come to Mobile to get "revenge" for the death of his brother. The inference is clear that appellant's "partner" Daniels was to commit the killings pursuant to a contract or for hire. This evidence decidely falls within the parameter of a murder done for pecuniary gain or pursuant to a contract or for hire as defined in § 13-11-2(7), Code of Ala. 1975.

It does not matter that the appellant himself did not commit the murders. A jury question was presented as to whether appellant was Daniels' accomplice. The jury was correctly charged on the law regarding accomplice participation in a crime.

Under the accomplice statute, § 13-9-1, Code of Ala. 1975:

> "The distinction between an accessory before the fact and a principal, between principals in the first and second degree, in cases of felony, is abolished; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense or aid or abet in its commission, though not present, must hereafter be indicted, tried and punished as principals, as in the case of misdemeanors." (Emphasis added.)

The applicability of the accomplice statute to the death penalty statute has been discussed in Colley v. State, ___ So. 2d ___ (Ala. Cr. App. 1979); in a special concurrence in Ritter v. State, ___ So. 2d ___ (Ala. Cr. App. 1978); and by the Alabama Supreme Court in Ritter v. State, ___ So. 2d ___ (Ala. 1979). A general verdict of "guilty of murder as charged in the indictment" was returned by the jury. Conceivably the jury could have found appellant guilty under Count 2 of the indictment. We find

that the accomplice statute is applicable to sustain the verdict in the instant case.

The circumstantial evidence was ample for the jury to have found that the appellant was an active participant in the murders and that he was present at the scene of the murders with a view to render aid to Daniels as it became necessary. Where the evidence presented raises questions of fact for the jury and such evidence, if believed, is sufficient to sustain a conviction, the denial of a motion to exclude the State's evidence does not constitute error. Young v. State, 283 Ala. 676, 220 So. 2d 843 (1969). Thus by way of the accomplice statute, Count 2 of the indictment was properly allowed to remain before the jury for their consideration. We do not

say that the jury found the appellant guilty under Count 2, only that they properly had the option of so finding.

B

As to the second part of appellant's argument, we hold that the trial court could properly have found at the sentence hearing in considering the aggravating and mitigating circumstances that the killings were not committed for pecuniary gain and that the appellant was not an accomplice to the murders. Sections 13-11-6(6) and 13-11-7(4), Code of Ala. 1975. This is so despite the fact that the trial court had previously given the jury the option of deciding these same questions of fact by properly allowing, as we have determined, Count 2 to remain before the jury for their consideration. This seemingly anomalous result is

peculiar to the death penalty statute and is explained as follows.

A basic legislative concern underlying our death penalty statute is that the sentence hearing be kept separate and apart from the trial itself and from any jury input as to the ultimate sentence to be imposed which is either death or life without parole. Section 13-11-3, Code of Ala. 1975. The sentence hearing is conducted by the trial court sitting alone and only upon a prior jury determination at the trial that the accused is guilty of a capital offense. Such a prior determination of guilt by the jury carries an automatic death sentence; the jury input stops at that point. Boiled down to its essence, the sentence hearing is designed in theory to benefit the accused by allowing the trial court to reduce his sentence

from death to life without parole when the mitigating circumstances so require. The trial court in effect is allowed to act as a sentence reducer if it finds sufficient mitigating circumstances or lack of aggravating circumstances. Sections 13-11-3 and 13-11-4.

The sentence hearing is further differentiated from the trial by what evidence is allowed to be presented.

> "...In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; provided further, that this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution

> of the United States or the state of Alabama...." (Emphasis added.) Section 13-11-3, Code of Ala. 1975.

By definition the trial court is to have latitude and discretion as to what matters may be presented and considered at the hearing. Specifically the trial court is not limited by the exclusionary rules of evidence it is required to adhere to during the actual trial. in short the trial court at the sentence hearing is allowed substantive and procedural flexibility which is generally prohibited during the jury trial.

Thus it is a natural consequence that the trial court having at hand not only the benefit of the facts garnered at the trial, but also the "relevant" and "probative" matters gleaned at the sentence hearing, may make findings of fact which include aggravating and mitigating circumstances which are

seemingly at odds with the prior jury determination. Nonetheless, unless a clear abuse of discretion is shown, the trial court's findings of fact will be upheld.

In the case at bar there was sufficient evidence for Count 2 of the indictment to have remained before the jury. This was so by way of the accomplice statute. However, as previously stated, Counts 1 and 3 charged murder in the first degree wherein two or more persons were intentionally killed. The charges in Counts 1 and 3 were in no way connected with a killing for pecuniary gain, nor under those counts was there the necessity of finding that the appellant was an accomplice. Thus, if after the trial and sentence hearing the trial court independently determined that the murders were accomplished

pursuant to the charges in Counts 1 and 3 and not Count 2, it was entirely within the trial court's discretion to find that the killings were not committed for pecuniary gain and that the appellant was not an accomplice. Further discussion regarding the trial court's findings of fact after the sentence hearing will be necessary later in this opinion, but for the purpose of this issue we find no abuse of discretion.

III.

Prior to trial the appellant filed a "Motion to Require District Attorney to Disclose Evidence." Side bar colloquy by the assistant district attorney regarding State evidence which he considered would be a "bomb" or "big surprise" prompted this motion. The trial court granted the motion and ordered the district

attorney's office "to submit to the attorneys for the defendant a list of all witnesses which have been subpoenaed and a list of all witnesses who will be subpoenaed."

At trial the State called their "bomb," Eddie Hebison, a narcotics officer for the state of Texas. Officer Hebison's name was not included on the list of witnesses submitted by the State which included thirty-four names. Officer Hebison's testimony was basically that on March 19, 1976, he went to the "Wet and Wild Lounge" in Houston, Texas, working as cover for his partner, David Hammonds, who was to arrange a drug transaction with the appellant. While sitting at a table with his back to Agent Hammonds and appellant, he heard appellant tell Hammonds "that he would not do any larger drug transaction with

him at this time because he was going to Alabama to take care of some family business and kill someone there, and that he had learned that his brother's killing had not been an accident, that it was - that he had been murdered with a sawed-off shotgun in a drug rip off deal." Appellant did sell a small quantity of marijuana and methamphetamine to Agent Hammonds at that time. In a Texas trial that resulted in a hung jury, Officer Hebison testified against appellant as to that sale in Texas.

Appellant maintains that reversible error occurred when the State called Officer Hebison whose name was not included on the list of witnesses which the court had ordered to be turned over. Appellant contends that had Hebison's name been included the Texas transcript concerning the drug case could have been

obtained. Without the Texas transcript, appellant argues he was not able to effectively impeach Hebison and that his right to cross-examination was impaired. We do not agree.

While this court will not sanction disregard of a court order, we have been cited to no authority which would require the State to submit to an accused a list of all witnesses it expects to call at the accused's trial. In Thigpen v. State, 49 Ala. App. 233, 270 So. 2d 666, 671 (1972), this court stated:

> "...we do not deem the constitutional right to compulsory process in a criminal case to operate in such a manner as to compel pre-trial discovery as to who in fact are witnesses for the State. Rather, the law assumes that defense counsel will act with due diligence so as to have such witnesses as necessary available at trial. Then, by way of compulsory process for obtaining such witnesses, the

> defendant is secured of a proper presentation of his case at trial...."

In Dolvin v. State, 51 Ala. App. 540, 287 So. 2d 250 (1973), fifteen witnesses were listed on the docket sheet at least three days before the trial. This represented two-thirds of the witnesses called by the State. This court in Dolvin, relying in part on the Thigpen decision, held that knowledge of the identity of the fifteen witnesses could have furnished the defense counsel with some indication of the remaining eight witnesses which were called. In Thigpen and Dolvin it was pointed out that the defendant had ample opportunity for a thorough and extensive cross-examination.

In the case at bar the appellant conducted a thorough and sifting cross-examination of Officer Hebison. In addition, Officer Hebison's partner,

David Hammonds, was included on the witness list submitted by the State. He, too, had testified in the Texas drug case. Thus access to the Texas transcript, for whatever conceivable defense purpose it might have served, could have been obtained by notice that Hammonds was going to be called as a State witness. Furthermore, Agent Hammonds was called in the instant case and testified to substantially the same facts regarding his conversation with the appellant in the "Wet and Wild Lounge." Thus Hebison's testimony was fully corroborated by an "anticipated" witness. Therefore, the absence of Officer Hebison's name from the State's witness list was harmless at most. ARAP, Rule 45.

IV

After the jury had deliberated approximately four hours, they returned with questions for the court. From the record the following exchange occurred:

> "FOREMAN: The question - we had two questions, really. We'd like to hear a restatement of your charge, and the second question is what happens if there is a hung jury?
>
> "THE COURT: Well, I'm going to answer your first question first - I mean your second question first. Under our legal system in the event that you people cannot reach a unanimous verdict it would be incumbent upon this Court to declare a mistrial, which in effect means that approximately six to eight to twelve weeks from now another jury would be empaneled, another jury would hear the exact same evidence that you heard, would hear the exact same charge that you heard and then it would be submitted to that jury...."

The appellant contends that this charge was erroneous. No exception was taken to this charge. Appellant relies on the

"plain error" rule[1] for his preservation of error. ARAP, Rule 45A.

Section 13-11-2(c), Code of Ala. 1975, states the course to be followed in the event of a mistrial in a capital felony:

> "...The court may enter a judgment of mistrial upon failure of the jury to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the defendant may be tried again for the aggravated offense, or he may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance. If the defendant is reindicted for an offense wherein the indictment does not allege an aggravated circumstance, the punishment upon conviction shall be as heretofore or hereafter provided by law; however, the punishment shall not be death or life imprisonment without parole"

---

[1] ARAP, Rule 39(k), concerning certiorari has been held applicable to the trial court's oral instructions. Ex parte Jacobs, 371 So.2d 448 (Ala. 1979).

Appellant asserts that the court's failure to apprise the jury of the option contained in § 13-11-2(c) was prejudicial.

Although the trial court's answer to the jury's question did not comprehensively track all the language of § 13-11-2(c), we hold that the instruction given (or lack of option apprisal) did not constitute "plain error" within the meaning of ARAP, Rule 45A. For that rule to apply there must first be error, and it must be plainly visible in the record. Colley, supra. Here, the trial court's instruction was correct so far as it went. It did not misstate the law. That "another jury could hear the exact same evidence." and "would hear the exact same charge" in the event of a hung jury was a very real possibility and indeed a probability. We note that the trial

court's response in no way curbed the jury's right to fail to decide appellant's fate. A "hung jury" could still easily have occurred.

Moreover the "option" to reindict the appellant at a later time for a noncapital offense rested entirely with the State. The "option" would at no time become the "appellant's option." It is sheer speculation whether the jury would have failed to reach a unanimous verdict had they been informed of the State's option. It is further speculation whether the appellant would have been reindicted for a noncapital offense in any event. This court will not base its opinion on speculation or surmise. Thus on this issue we are required to decide whether an omission in the trial court's instruction in response to the jury question effectively deprived appellant

of his right to a fair trial free from prejudice. We do not believe that it did. Where a trial court's instruction to the jury is not as full as counsel desires, his remedy is to request written charges covering the matter omitted. Smith v. State, 262 Ala. 584, 80 So.2d 307 (1955). Here, counsel for appellant neither excepted nor requested further instructions to the jury. Accordingly, we hold the "plain error" rule inapplicable in this instance.

V

Several questions are raised concerning the trial court's order after the sentence hearing was conducted. For the sake of clarity we set forth the entire order of the court sentencing the appellant to death.

"The court having conducted a hearing pursuant to Title (sic) 13-11-3 of the Code of Alabama, to determine whether or not the Court will sentence Mr. Phillip Wayne Tomlin to death or to life imprisonment without parole, and the Court having considered the evidence presented at the trial and at said sentencing hearings; the Court makes the following findings of fact:

"The Court first considers the aggravating circumstances as outlined and described in Title (sic) 13-11-6:

"(a) The Court finds that the Capital Felony was committed by Phillip Wayne Tomlin or that he was present at and assisted in the commission of the Capital Felony;

"(b) The Court finds no evidence that Mr. Phillip Wayne Tomlin was previously convicted of another Capital Felony. However the Court finds that the Defendant has been in and out of trouble with the police on prior occasions;

"(c) The Court finds that other than set out above in subparagraph (b), there is no evidence that the Defendant did knowingly create a great risk of death to many persons:

"(d) The Court finds the Capital Felony was committed while the Defendant was engaged in the commission of a double homicide in violation of Title (sic) 13-11-10;

"(e) The Court finds the Capital Felony was not committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

"(f) The Court finds the Capital Felony was not committed for pecuniary gain, within the meaning of Title (sic) 13-11-6(6) of the Code of Alabama.

"(g) The Court finds the Capital Felony was not committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of law;

"(h) The Court finds that Phillip Wayne Tomlin killed or participated in the double murder of Cheryl Moore, a teenager of fifteen years of age, and Richard Brune, a teenager of nineteen years of age, at the Interstate 10 Highway Exit Ramp at Theodore-Dawes, Mobile County, Alabama.

"It is the judgment of the Court that the Capital Felony

was especially heinous, atrocious, or cruel.

"The Court now considers mitigating circumstances as described and set out in Section 13-11-7, Code of Alabama.

"(a) The Court finds that Phillip Wayne Tomlin has a history of prior criminal activity;

"(b) The Court finds that the Capital Felony itself was not committed while Phillip Wayne Tomlin was under the influence of extreme mental or emotional disturbance;

"(c) The Court finds that the victims were not a participant in Phillip Wayne Tomlin's conduct, and did not consent to the act.

"(d) The Court finds that Mr. Tomlin was not an accomplice in the Capital Felony committed, but was, in fact a principal who was present and assisted in the commission of the double homicide.

"(e) The Court finds that Phillip Wayne Tomlin did not act under extreme duress or under the substantial domination of another person.

"(f) The Court finds that the capacity of Phillip Wayne Tomlin to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired.

"The Court having considered the aggravating circumstances and the mitigating circumstances and after weighing the aggravating and mitigating circumstances, it is the judgment of the Court that the aggravating circumstances far outweigh the mitigating circumstances and that the death penalty as fixed by the Jury should be and is hereby accepted.

"It is therefore considered and adjudged by the Court that Phillip Wayne Tomlin is guilty of the Capital Felony charged in the indictment, and specifically of intentionally killing Cheryl Moore and Richard Brune during the commission of a double murder.

"It is therefore ordered and adjudged that you, Phillip Wayne Tomlin, suffer death by electrocution at any time before the hour of sunrise on the 8th day of March, 1979, inside the walls of the William C. Holman Unit of the Prison System at Atmore, Alabama, in a

room arranged for the purpose of electrocuting convicts sentenced to death by electrocution.

"It is therefore further ordered and adjudged by the Court that the Warden of William C. Holman Unit of the Prison System at Atmore, or in the case of his death, disability, or absence, his Deputy, or in the event of the death, disability, or absence of both the Warden and his Deputy, the person appointed by the Commissioners of Corrections, at any time before the hour of sunrise shall on the 8th day of March, 1979, inside the walls of the William C. Holman Unit of the Prison System at Atmore, in a room arranged for the purpose of electrocution convicts sentenced to death by electrocution, cause to pass through the body of said Phillip Wayne Tomlin, a current of electricity of sufficient intensity to cause his death, and the continuance and application of such current through the body of the said Phillip Wayne Tomlin until the said Phillip Wayne Tomlin be dead, and may Almighty God have mercy on Your Soul."

It is argued that certain aggravating circumstances found by the trial court in the above order are not aggravating circumstances as defined in § 13-11-6, Code of Ala. 1975. We agree. A basic rule of review in criminal cases is that criminal statutes are to be strictly construed in favor of those persons sought to be subjected to their operation, i.e. defendants. Ex parte Clements, 370 So.2d 723 (Ala. 1979); Schenher v. State, 38 Ala.App. 573, 90 So.2d 234, cert. denied, 265 Ala. 700, 90 So.2d 238 (1956). Penal statutes are to reach no further in meaning than their words. Clements, supra; Fuller v. State, 257 Ala. 502, 60 So.2d 202 (1952).

The first aggravating circumstances listed by the trial court, "that the Capital Felony was committed by Phillip Wayne Tomlin or that he was present at

and assisted in the commission of the Capital Felony," is not an aggravating circumstance within the meaning of § 13-11-6 and should not be listed as such. That finding is closer akin to a finding of fact as per § 13-11-4. The second sentence of the trial court's finding in paragraph (b) of the aggravating circumstances is inappropriate for the same reason. Likewise is the trial court's fourth aggravating circumstance (d) defective. That "the Capital Felony was committed while the Defendant was engaged in the commission of a double homicide in violation of Title (sic) 13-11-10 is not an aggravating circumstance within § 13-11-6. Section 13-11-10 is not contained in the Code. Also, the first part of the trial court's eighth aggravating circumstances (h), "that Phillip Wayne Tonlin killed or participated in the double murder of

Cheryl Moore, a teenager of fifteen years of age, and Richard Brune, a teenager of nineteen years of age, at the Interstate 10 Highway Exit Ramp at Theodore-Dawes, Mobile County, Alabama," is not an aggravating circumstance.

The above "aggravating circumstances" are not contained in the § 13-11-6 language and should not have been included as such in the trial court's sentencing order as aggravating circumstances.

That the capital felony was especially heinous, atrocious, or cruel is an aggravating circumstance under § 13-11-6(8); however, the trial court is required to set out the basis of such a finding. See: Colley, supra; Hubbard v. State, ____ So.2d ____, (Ala.Cr.App. 1979); Johnson v. State, ____ So.2d ____, (Ala.Cr.App., May 22, 1979); Alford v.

State, 307 So.2d 433, (Fla. 1975); State v. Dixon, 283 So.2d 1 (Fla. 1973).

To negate one of the mitigating circumstances, the trial court must determine whether appellant has a significant history of prior criminal activity within the meaning of Ex parte Cook, 369 So.2d 1251, 1257 (Ala. 1978). It is not sufficient that appellant had a "history of prior criminal activity" to negate the mitigating circumstance of § 13-11-7(1). Appropriate facts which substantiate this finding should be listed.

Though not raised by the appellant, we note that the trial court's order does not contain a statement of "the findings of fact from the trial" as required by § 13-11-4. The pertinent portion of § 13-11-4, Code of Ala. 1975, reads as follows:

"...If the court imposes a sentence of death, it shall set forth in writing, as the basis for the sentence of death, findings of fact from the trial and the sentence hearing, which shall at least include the following:

"(1) One of more of the aggravating circumstances enumerated in section 13-11-6, which it finds exists in the case and which it finds sufficient to support the sentence of death; and

"(2) Any of the mitigating circumstances enumerated in section 13-11-7 which it finds insufficient to outweigh the aggravating circumstances."

See Johnson, supra, for comprehensive findings of fact accompanied by aggravating and mitigating circumstances by the trial court upon the conclusion of the sentence hearing.

We have carefully searched the record for any error prejudicial to the appellant. We have applied the "plain error rule." After due consideration to

the record and to the alleged errors asserted on appeal, it is our opinion that the appellant received a fair trial.

However, due to the deficiencies in the sentencing order, this cause must be remanded with directions that the trial court's order be extended to include findings of fact from the trial and sentence hearing and for a correction of aggravating and mitigating circumstances as defined by the statute and that such be transmitted to this court in answer to the instant remand.

AFFIRMED IN PART; REMANDED WITH DIRECTIONS.

Tyson and DeCarlo, JJ., concur.
Harris, P.J., and Bowen, J., concur in result only.

BOWEN, J, concurring in result.

I disagree with the holding of the majority in Part IV of its opinion.

I concur only in the result reached by the majority because, in my opinion, the plain error rule of ARAP, Rule 45A, does apply to instructions which the trial judge failed to mention to the jury. Omissions from the charge may constitute error just as may misstatements or incorrect charges. The absence of certain instructions, by their very absence, will be just as "plainly visible" as an incorrect charge.

The majority states that the plain error rule is inapplicable but then finds that the omission does not prejudice the defendant. In effect, they apply the plain error rule while denying its applicability. I would merely apply the rule.

APPENDIX "B"

AUG 28, 1981

THE STATE OF ALABAMA - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1981

Ex parte: Phillip Wayne Tomlin

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: Phillip Wayne Tomlin

79-288 v.

State of Ala. ama)

PER CURIAM.

Reversed and remanded to the Court of Criminal Appeals on the authority of Beck v. Alabama, ____ U.S. ____, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980); Beck v. State, 396 So. 2d 645 (Ala. 1980); Ritter v. State, [MS. June 12, 1981] ____ So. 2d ____ (Ala. 1981); and Reed v.

State, [MS. June 12, 1981], on rehearing, [MS. August 28, 1981) ____ So.2d ____ (Ala. 1981).

REVERSED AND REMANDED.

All Justices concur, except Maddox, Jones and Adams, JJ., who concur specially.

MADDOX, JONES, AND ADAMS, JJ. (Concurring specially):

By concurring specially we adhere to the views expressed in our respective opinions in Ritter v. State, [MS. June 12, 1981], ____ So.2d ____ (Ala. 1981), to the effect that we would not reverse the conviction in any case in which the record of trial affirmatively precludes any showing which would entitle the defendant to a jury instruction on a lesser included offense.

Because the per curiam opinion mandates a retrial on the issue of guilt,

as well as the issue of sentence, we re-emphasize the proposition that an instruction on a lesser included offense is required "on any lesser included offense supported by the evidence," Beck v. State, 396 So. 2d 645, 657 (Ala. 1980), but an instruction on a lesser included offense would be appropriate only if there was evidence which would support the giving of such an instruction. Roberts v. Louisiana, 428 U. S. 325, 96 S. Ct. 3001, 49 L. Ed. 2d 974 (1976), Beck v. Alabama, 100 S. Ct. 2382, 2386 (footnote 7) (1980).

APPENDIX "C"

DEC. 9, 1983

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1983-1984

Ex parte: Phillip Wayne Tomlin

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Phillip Wayne Tomlin

79-288 v.

State of Alabama)

ON APPLICATION FOR REHEARING

FAULKNER, JUSTICE.

Phillip Wayne Tomlin was convicted under Alabama's 1975 death penalty statute of first degree murder wherein two or more people are intentionally killed by one or a series of acts and of first degree murder done for a pecuniary

or other valuable consideration or pursuant to a contract or for hire. Sections 13-11-2(a)(10) and (7), Code of Alabama (1975) (repealed). The trial court held a sentencing hearing and entered an order setting out its findings as to aggravating and mitigating circumstances and sentencing the defendant to death. On appeal the Court of Criminal Appeals affirmed the defendant's conviction, but found the trial court's sentencing order defective in several aspects. It entered an order remanding the cause with instructions to the trial court to amend its sentencing order to comply with the Court of Criminal Appeals' decision.

While Tomlin's petition for writ of certiorari was pending before this court, the United States Supreme Court handed

down Beck v. Alabama, 447 U.S. 625 (1980), in which it found Alabama's 1975 death penalty statute defective because the preclusion clause in the act prohibited juries from considering any lesser included offenses. Because we interpreted Beck v. Alabama to require that all defendants theretofore convicted under that statute be granted new trials, we entered an order reversing Tomlin's conviction.

The State filed an application for rehearing in which it asked us to reconsider our interpretation of Beck v. Alabama. While the application for rehearing was pending, the Supreme Court released its opinion in Hopper v. Evans, 456 U.S. 605 (1982). Evans had been convicted and sentenced to death after testifying that he intentionally shot the proprietor of a pawnshop during a

robbery. Because Evans suggested no plausible claim not contradicted by his own testimony at trial which would entitle him to a jury instruction on a lesser included offense, the Court ruled that he had not been prejudiced by the preclusion clause. It concluded, therefore, that Evans was not entitled to a new trial. Hopper, supra, 456 U.S. at 613-14. We hereby withdraw our previous opinion in this case in order to enter an order in accordance with Hopper and its progeny.

A defendant convicted under § 13-11-2 of the 1975 statute is entitled to a new trial because of the preclusion clause in the statute if there was evidence introduced at trial which would have warranted a jury instruction on a lesser included offense or if the defendant suggests any plausible claim

not contradicted by his own testimony which he might conceivable have made which would have entitled him to a jury instruction on a lesser included offense. Cook v. State, 431 So. 2d 1322, 1324 (Ala. 1983).

Tomlin testified that he was in Texas at the time of the killings. We examined in Cook v. State, supra, the effect of an alibi defense on the question of whether a defendant convicted under the 1975 death penalty statute is entitled to a new trial because of the preclusion clause. We concluded that when a defendant testified that he was in a distant location when the crime was committed, his own testimony directly contradicted any evidence he might have introduced to show that he was guilty of a lesser included offense. Cook, supra, at 1325.

Cook is clearly controlling here. The petitioner argued that, but for the preclusion clause, he might have introduced evidence that Daniels, who was allegedly with Tomlin at the time in question, did the killing, or that Tomlin intentionally killed only one of the victims, or that Tomlin was under the influence of drugs at the time of the killings. All of the claims suggested by the petition are, however, in conflict with Tomlin's own testimony. Tomlin is not, therefore, entitled to a new trial based on the presence of the preclusion clause in the statute.

Tomlin raised the following additional issues in his petition for writ of certiorari:

(1) Whether counts one and three of the indictment were defective;

(2) Whether the trial cort should have refused to allow the State to call a witness omitted from a list of potential witnesses supplied by the State;

(3) Whether the trial court should have granted a motion to exclude as to count two of the indictment which charged the defendant with murder for pecuniary or other valuable consideration or pursuant to a contract or for hire;

(4) Whether the jury charge was sufficient;

(5) Whether the verdict form was sufficient;

(6) Whether the trial court properly responded to questions from the jury as to what would happen in the event of a hung jury.

I.

SUFFICIENCY OF COUNTS ONE AND THREE OF THE INDICTMENT

Tomlin did not file his demurrer to the indictment until after the jury was empaneled. By appearing and entering a plea at his arraignment, the petitioner waived any irregularities in the indictment unless the indictment was so defective that it left the accused unaware of the nature and cause of the charges against him. Canada v. State, 421 So. 2d 140, 145 (Ala. Crim. App. 1982).

Omitting the formal parts of the indictment, count one charges that Tomlin:

> " . . . did unlawfully, and with malice aforethought kill Richard Brune and Cheryl Moore by, to wit: on January 2, 1977, at a location on or near

Interstate 10 in Mobile County, Alabama, was shot with a gun, [sic] in violation of Act Number 213, Section 2, Sub-Section J (Act # 213, §2(j)), Acts of Alabama, Regular Session, 1975, against the peace and dignity of the State of Alabama."

Petitioner's contention that count one charged no more than first degree murder of two persons is not well taken. The capital murder statute does require that the victim be killed by "one or a series of acts," an allegation omitted from count one of the indictment. The omission did not, however, leave the defendant unaware of the nature and cause of the charge against him in light of the reference to the death penalty statute by

act number in each count of the indictment.

Count three alleged, in pertinent part, that Tomlin:

> " . . . did unlawfully, intentionally, and with malice aforethought kill Richard Brune and Cheryl Moore, by shooting them with a gun, wherein both Richard Brune and Cheryl Moore were intentionally killed by PHILLIP WAYNE TOMLIN by one or a series of acts, in violation of Act Number 213, Section 2, Sub-Section J (Act #213, §2(j)) and Act Number 213, Section 6, Sub-Section H (Act #213, §6(h)), Acts of Alabama, Regular Session, 1975, in that said killings were especially

heinous, atrocious or

cruel...."

Count three was, if anything, overinclusive. We disagree with petitioner's argument that the State failed to prove that the murders were "especially heinous, atrocious or cruel." The State introduced evidence that Tomlin had planned to kill Ricky Brune for over nine months. He traveled from Texas to Mobile with a "hit man" for the express purpose of carrying out his plan to kill Brune. Tomlin and Daniels apparently gained entry into the back seat of Brune's car, and then shot not only Brune but also his fifteen-year-old companion in the back with a shotgun and a pistol. We are not inclined to rule as a matter of law that the murders were not especially heinous, atrocious or cruel.

II

FAILURE OF THE STATE TO DISCLOSE THE IDENTITY OF A WITNESS PRIOR TO TRIAL

About nine months prior to the killings, two officers from the Texas Department of Public Safety, operating undercover, talked with the petitioner at a night club in Houston, Texas, in connection with an investigation of illegal drug trafficking. During the conversation Tomlin allegedly stated that he intended to go to Alabama to "kill someone." Tomlin was subsequently prosecuted in Texas on a drug charge but was not convicted. His case was nol-prossed after a mistrial.

The trial court in the instant case ordered the State to submit to the defendant the list of the witnesses it intended to call at trial. The list included one of the two Texas police

officers. At trial the State called both officers, who testified to their conversation with Tomlin. Petitioner objected to the testimony of the unlisted witness, Officer Hebison. On appeal he argued that, had he known Hebison was going to testify, he would have acquired a transcript of the Texas proceedings in order to facilitate his cross-examination of Hebison.

We fail to see how inclusion of both officers' names would have provided any better notice of the need to obtain the Texas transcript than was afforded by the inclusion of one of their names. Both testified to substantially the same facts. If, indeed, there was any error, it was harmless. A.R.A.P. 45.

III

WHETHER A MOTION TO EXCLUDE SHOULD HAVE BEEN GRANTED AS TO COUNT TWO

Count two charged that the killings were done for pecuniary or other valuable consideration or pursuant to a contract or for hire, in violation of § 13-11-2 (a)(7), Code of Alabama (1975) (repealed). The trial court submitted all three counts to the jury, which returned a verdict of guilty "as charged in the indictment." The jury, therefore, convicted Tomlin of every crime included in the indictment, including murder pursuant to a contract or for hire.

The Court of Criminal Appeals affirmed, based on the evidence that Tomlin was accompanied by Daniels, whom he introduced as a "hit man." Even though Tomlin did not himself act pursuant to a contract or for hire, there

was sufficient evidence to convict him because under Alabama's accomplice statute all persons concerned in the commission of the crime must be indicted, tried, and punished as principals. Section 13-9-1, Code of Alabama (1975) (repealed).

The petitioner argued that the court's findings in its sentencing order could not be reconciled with the jury verdict. The court's sentencing order states, inter alia, that "the capital felony was not committed for pecuniary gain" and that "Mr. Tomlin was not an accomplice ... but was in fact a principal who was present and assisted in the commission of the double homicide."

The finding that Tomlin did not act for pecuniary gain was not at odds with the theory that he hired Daniels as his "hit man" and was, therefore, liable as

Daniel's accomplice. The court's finding that Tomlin was not an accomplice but was present and assisted in the killings is incongruous on its face. If Tomlin assisted Daniels in the killings he was, by definition, Daniel's accomplice. The finding in question was made with reference to § 13-11-7(4), Code of Alabama (1975) (repealed), which provides that it is a mitigating circumstance to be considered in sentencing the defendant if the defendant was an accomplice whose participation was relatively minor. The court was apprently attempting to state that Tomlin was not an accomplice whose participation was relatively minor, but simply omitted that crucial language. At any rate, the issue is moot. The Court of Criminal Appeals ruled that the finding in question was "defective" and ordered that the cause be remanded for a

correction of the sentencing order. Objections based on the content of the sentencing order should be raised after remandment.

IV

SUFFICIENCY OF THE JURY CHARGE

On appeal petitioner argued, for the first time, that the elements of premediatation, unlawfulness, and malice aforethought should have been included in the charge. Failure to include these elements, he argued, constituted plain error which affected his substantial rights. A.R.A.P. 39(k).

We disagree. The oral charge must be judged within the context of the facts in dispute. Van Antwerp v. State, 358 So. 2d 782, 786 (Ala. Crim. App.), cert denied, 358 So. 2d 791 (Ala. 1978). There was no dispute as to whether the

killings were premeditated, unlawful, and done with malice aforethought. Tomlin either carried out the brutal, execution-style killings after months of planning or he was in Texas at the time of the killings and had no knowledge of them. There was no evidence to suggest accident, passion, justification, or provocation.

V

SUFFICIENCY OF THE VERDICT FORM

Although he did not object to the verdict form which was offered to the jury, petitioner now argues that there was a fatal variance between the indictment and the jury verdict, which read:

> "We, the jury, find the defendant guilty of murder as charged in the indictment and fix the punishment at death."

The same argument with regard to a verdict form which was virtually identical to the one in the case at bar was rejected in Johnson v. State, 399 So. 2d 859, 865 (Ala. Crim. App.), affirmed in part, reversed in part on other grounds, 399 So. 2d 873 (Ala. 1979). That case is controlling.

VI

THE COURT'S INSTRUCTIONS REGARDING A MISTRIAL

After the jurors had deliberated some four hours, they returned with several questions, the second of which was:

> "What happens if there is a hung jury?"
>
> The Court replied:
>
> "Well, I'm going to answer your first question first -- I mean you second question first.

Under our legal system in the event that you people cannot reach a unanimous verdict it would be incumbent upon this Court to declare a mistrial, which in effect means that approximately six to eight to twelve weeks from now another jury would be empaneled, another jury would hear the exact same charge that you heard and then it would be submitted to that jury. Okay?"

Although he did not object at trial, the petitioner argued on appeal that it was plain error for the court not to instruct the jury of the possibility that Tomlin could have been reindicted and tried for non-capital murder.

It is true that the option mentioned by the petitioner would have been open to the State in the event of a mistrial. For that matter, the State could have dropped all charged against the defendant. We fail to see how the omission could have prejudiced the defendant. Looking at the instruction from Tomlin's vantage point when the question was asked, an instruction which fully set out all alternatives open to the State, including the State's option to nol-pros the case, would have been as likely to harm as to benefit the defendant. Petitioner cannot, after waiving his objection at trial, bring the matter up on appeal.

The decision of the Court of Criminal Appeals is hereby affirmed.

APPLICATION GRANTED; OPINION OF AUGUST 28, 1981 WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED.

Torbert, C.J., Maddox, Jones, Shores, Embry, Beatty and Adams, JJ., concur.

Almon, J., not sitting.

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, hereby certify that on this _____ day of March, 1984, I did serve the requisite number of copies of the foregoing on the Attorneys for Phillip Wayne Tomlin, Petitioner, by mailing the same to them first-class postage prepaid and addressed as follows:

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